91-62 (1)

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MICHAEL W. BARNETT,
BY HIS PARENTS AND NEXT FRIENDS
JAMES E. AND CYNTHIA BARNETT, *et al.*,
Petitioners,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the decision of the court below affirming the trial judge's findings, without addressing petitioners' contention that the trial court improperly struck their demand under the Seventh Amendment for trial by jury and decided the questions that should have been presented to the jury, conflict with this Court's decision in *Lytle v. Household Manufacturing Co.*?

2. Are petitioners entitled to seek make-whole relief, including compensatory damages, under the Education of the Handicapped Act (EHA), § 504 of the Rehabilitation Act of 1973, or the Civil Rights Act of 1871, as other courts of appeals have held, and, if so, are petitioners entitled under the Seventh Amendment to a trial by jury?

3. Did the court below err in ruling that the EHA and § 504 require that the burdens of proof and production rest with a public school student with a disability to demonstrate the feasibility of educating him in a nonexclusionary, nonsegregative manner, *or* -- consistent with decisions of this Court and other courts of appeals -- should the burden be on the school system to demonstrate the necessity for excluding and segregating the student, once the student has made a prima facie showing of exclusion and segregation?

4. Did the lower court err in holding that, under the EHA, the substance and details of a student's educational program, including its location and the feasibility of its being provided at his community school, are to be left completely to school officials, *or* should those matters be determined by the student's individualized education plan, with input from the student and his parents, as well as school officials?

5. Did the lower court err in holding that the additional burdens -- compared to those imposed on students without disabilities -- placed upon petitioner by the school system by requiring him to attend a school outside of his community, and forcing petitioner to ride a segregated bus to school each day, did not violate § 504 and the EHA?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the court of appeals were appellants (now petitioners) Michael, Cynthia, and James Barnett. Petitioner Michael Barnett sometimes will be referred to as "Michael" or "the student."

The appellee below (now respondent) was the Fairfax County School Board. Respondent sometimes will be referred to as "the school board."

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported at 927 F.2d 146 (4th Cir.1991)(App.A). The opinions of the district court are reported at 721 F.Supp. 755 (E.D.Va.1989) and 721 F.Supp. 757 (E.D.Va.1989)(Apps.D & E). The state and local administrative decisions are unreported but are printed in the appendix (Apps.F & G).

JURISDICTION

The opinion and order of the court of appeals was entered on January 28, 1991. A timely petition for rehearing was denied by order entered on March 8, 1991. By order of Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, petitioners were granted an extension of time to file this petition to and

including July 6, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS THAT GOVERN THIS CASE

This case involves the Seventh Amendment to the Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; §§ 504 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794, 794a(a)(2); the Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1400-15;[1] and regulations of the Department of Education enforcing § 504 and the EHA, 34 C.F.R. parts 104, 300. The pertinent texts of these provisions are included in Appendix H, attached hereto.

STATEMENT OF THE CASE

This case concerns Michael Barnett, a student who is deaf. He has been excluded from his community school, provided different and inferior education benefits, and forcibly segregated each day on a "handicapped" bus.

The Legacy of Segregation, Exclusion, and Discrimination Imposed on Students with Disabilities by State and Local Officials

The school board's practices are a vestige of exclusions historically visited upon children with disabilities. The Virginia legislature excluded from its education laws "children weak in body or mind," 1908 Va. Acts 364, and "children mentally or physically incapacitated for school work," 1928 Va. Acts 1214. These laws were not repealed until 1975 (1975 Va. Acts 1183, ch. 558), with the enactment of § 504 and the EHA.

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[1] In 1990 amendments, Congress changed the name of the EHA to the Individuals with Disabilities Education Act. Since the courts below referred to the Act as the EHA, we shall continue to do so in this petition.

A Fairfax County official testified at trial that persons with severe deafness like Michael historically were shunted away to congregate schools far from their communities. Changes began to occur recently, but not voluntarily. Only as a result of requirements of § 504 and the EHA and the issuance of federal rules in 1977 did change occur. Even then, the school board resisted. On May 19, 1977, three weeks after publication of the federal § 504 regulation, the school board adopted a discriminatory rule (since repealed) requiring faculty to "minimize the impact of the special education program [*i.e.*, those with disabilities] on the general education [*i.e.*, those without disabilities] staff and student body."[2]

In each state children with disabilities were excluded from education requirements.[3] They were declared by legislatures to be a "menace to the happiness . . . of the community,"[4] "unfitted for companionship with other children,"[5] whose very presence in the community was "detrimental to normal" children,[6] whose "mingling . . . with society" was "a most baneful evil."[7] State statutes authorized and directed others to take children with disabilities out of the public schools and even out of their own family homes and segregate the children even if their parents "should neglect or refuse" to do so.[8] One state made it a criminal offense, punished by a $200 fine, for a parent

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[2] There can be no doubt that an identical racial policy (*e.g.*, requiring faculty to "minimize the impact of [blacks] on the [white] staff and students") would violate Title VI of the Civil Rights Act of 1964 and the 14th Amendment.

[3] *E.g.*, 1902 Md.Laws 377, ch. 269, § 1; 1903 Cal.Stat. 270; 1907 Minn.Acts, ch. 81, §§ 2-4; COLO.REV.STAT., § 530 (1908); 1912 Ariz.Sess.Laws, ch.77, § 89(3); 1925 Tenn.Pub.Acts 366, § 18; ALA.SCHOOL CODE, § 304 (1927); CONN.GEN.STAT., § 252(c)(1933).

[4] 1919 Ala. Acts 739, No. 568, § 7.

[5] 1909 Wash. Laws 260, tit. I, subch. 6, § 2.

[6] CALIFORNIA BOARD OF CHARITIES AND CORRECTIONS, FIRST BIENNIAL REPORT 41 (1905).

[7] REPORT OF THE BOARD OF BUILDING COMMISSIONERS OF THE STATE OF OREGON TO THE TWENTY-FOURTH LEGISLATIVE ASSEMBLY, REGULAR SESSION 22, 23 (1906).

[8] 1920 Miss. Laws 294, ch. 210, § 17; 1921 W.Va. Acts 480, ch. 131, § 4(a); *accord*, 1919 Ala. Acts 740, No. 568, § 9 ("notwithstanding the family or relatives may object"); *see also* 1909 Okla.Sess.Laws 538, ch.34, art.2, § 8.

to refuse.[9] 37 states went further and authorized involuntary sterilization for those considered "manifestly unfit."[10]

States required parents to "waive all right to remove such inmate [*sic*] thereafter either permanently or for a limited time,"[11] to keep from society children with disabilities "whose parents or guardians are adverse to such actions."[12] Officials made the judgment that children with severe disabilities in the home were a "menace to . . . the family."[13] As one state's official put it, "the fact of primary importance to remember is that a defective child will be a defective adult, and will die a defective. There is not a philosopher's stone to turn the base metals of defect into gold."[14]

The Severe Injuries Suffered by Michael as a Result of the Significant Burdens Inflicted upon Him by the School Board

Ignoring Michael's exclusion and segregation and inferior treatment, the courts below erroneously asserted that his "sole

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[9] 1905 Wash. Laws 135, ch. 70, § 9.

[10] In 1927, Carrie Buck argued here that sterilization imposed on her by Virginia officials because of her disability was unconstitutional. The Court rejected her argument in *Buck v. Bell*, 274 U.S. 200 (1927), the epitome of this country's historic attitudes regarding disability. In *Buck*, Justice Holmes refused to apply the Court's earlier ruling in *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923)(the historic practice of "'put[ting] away . . . the offspring of the inferior, or of the better when they chance to be deformed'" would "do . . . violence to both the letter and spirit of the Constitution") to children with disabilities, expressed the belief of professionals of the day, ratified the view of state authorities that persons with disabilities were "a menace" by juxtaposing the country's "best citizens" (those without disabilities) with those who "sap the strength of the state" (persons with disabilities), and, to avoid "being swamped with incompetence," ruled: "It is better for all the world, if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are *manifestly unfit* from continuing their kind." 274 U.S. at 207 (emphasis added).

[11] 1905 Mich. Acts 169-70, No. 121; 1919 N.J.Laws 508, ch. 217, § 3; *accord*, 1919 Mont. Laws 198, ch. 102, § 9; 1909 N.D.Sess.Laws 317-18, ch. 213, § 1.

[12] CALIFORNIA BOARD OF CHARITIES AND CORRECTIONS, BIENNIAL REPORT 30 (1916); *accord*, FIRST BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS OF NEBRASKA INSTITUTIONS 11 (1915)(children with disabilities to be "detained in the institution against the desire of the parent" when necessary).

[13] 1906 Md. Laws 653, ch. 362; 1885 Cal. Stats. 198, ch. 156, § 8.

[14] ANNUAL REPORT OF THE GEORGIA TRAINING SCHOOL 4 (1922).

objection" (E-2) was the additional travel time and distance (*id.*) imposed on him by the school board. While the travel time was a significant aspect of his discriminatory treatment,[15] Michael's major injuries were the stigma and feelings of isolation and discrimination stemming from being the *only* student barred from his community school (F-23). Michael felt like an outcast, and was embarrassed and emotionally pained and frustrated (*id.*). Michael's distress was aggravated by the fact that his daily commute to Annandale took him right past West Springfield.

The stigma was exacerbated by Michael's school bus, which differed conspicuously from normal busses, with distinctive markings plainly designating it as the "handicapped" bus. People knew that only deaf students rode on the bus route he took. That forced segregation was embarrassing, and deprived Michael of an important opportunity to interact with nondisabled peers. Michael felt others thought he must be "stupid if I ride that bus."

According to the trial testimony of Dr. Cornett, an academic luminary in communication with deaf persons and the inventor of

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[15] Michael's travel time was some 62 minutes per round trip (F-12-13). On June 9, 12, and 13, 1989, Michael timed the trips on a stop watch:

Dates:	June 9, 1989	June 12, 1989	June 13, 1989
To AHS	41 mins.	32 mins.	32 mins.
From AHS	27 mins.	28 mins.	25 mins.

Michael's home is only 5 to 8 minutes from West Springfield (F-12). As a result of the trips for classes and school activities, Michael was burdened with *11-1/2 hours* of travel time *each week*, longer when there were backups (F-13). This amounted to over seven hours a week in *extra* travel time. Michael was embarrassed by being late for class as a result of being stuck in traffic; everyone knew he came from another community because of his disability.

The commute deprived Michael of time for school work and activities and social events and, just as important, socializing with friends in his community.(F-13). He was invited to join the National Honor Society, but declined due to the time it would have taken him to commute to meetings.

Michael's community friends often made after-school or weekend social plans while at school, making it difficult to include Michael since he was not there, nor could he share school activities with friends after school. Similarly, since Michael did not live in their community, it was difficult for Michael's classmates at Annandale to include him in their after-school and weekend social plans, or to work with Annandale students on group projects at home. Moreover, spending tiring and tedious hours in traffic affected Michael's ability to focus on studies. He had to stay up late to complete assignments. Michael was frustrated by the precious time wasted in transit (F-13).

Because of the long commute, Michael felt torn, cut off from his community (F-11-12). He lost close friendships. Deaf students attending community schools have far more time for studies and activities (F-13).

cued speech, the school board deprived Michael of his best opportunity to enhance his communication skills, with community peers who grew up with Michael and learned to accept, understand, and communicate with him.

The stigma and emotional harm Michael suffered was confirmed at trial by an educational psychologist with extensive, specialized experience in psychological evaluations of deaf students. Dr. Edelstein concluded that the school board's practices restricted Michael, were detrimental to and destructive of Michael's self-esteem, identity, motivation, and development of social relationships, causing great sadness, despair, anxiety, alienation, insecurity, dependency, isolation, distress, severe stigma, deep frustration, and loss of interest in high academic achievement.

The Failure of Michael's IEP Team to Consider Placement, And Michael's Categorical Placement by the School Board

Michael's individualized education program (IEP) failed to address the location of Michael's program, although Mrs. Barnett attempted to address that issue, as indicated by her handwritten note on the IEP. Michael's placement should have been driven by the IEP process, in which members of the IEP team, including the student's parents, are to make that determination on an individualized basis.

Nothing in Michael's IEP indicates *any* consideration of whether his individual needs required some arrangement other than his community school. Nor was there consideration of the feasibility of Michael's attending the school he would attend if he were not disabled. Nothing in the record indicates that Michael's IEP team even had authority to consider this central issue, let alone determine it.[16]

Michael's placement resulted from a categorical, unbendable policy. The school board's witnesses admitted, and the Hearing Officer found, that the school board would not permit any student requiring cued speech services to attend his community school. A school board witness stated at trial: "Q. Once the IEP calls

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[16] Michael's mother, a member of his IEP team, testified at trial that the team was not permitted to consider or discuss placement. Kate Tobin, who served as a school board team member, admitted that placing Michael's program at West Springfield never was considered by the team.

for the interpreter, then the question of whether or not that interpreter would be provided in the home base school is decided? A. That's correct."

Once a student like Michael required a daily interpreter, "that is our cutoff," and he automatically would be "bumped" into the congregate program at Annandale, regardless of his individual needs. The school board's process was to first establish programs at locations most convenient for staff, then to assign Michael to that program without considering whether Michael's individualized needs required that placement.

The Hearing Officer found that the school board "failed to consider Michael's social and personal needs," but "arbitrarily and capriciously established a policy that all persons in the aural/oral-cued speech program who are high school age students will be educated at a center-based school, Annandale High School" (F-25; *see also* F-30). He found that Michael was sent to Annandale for "the sole reason that 'West Springfield High School is not one of the high schools at which cued speech interpreter services are offered'" (F-30). The decision was not based "on the individual needs of Michael and instead [the school board] categorically placed him along with other handicapped children in the cued speech program in a school other than the community school which he would attend if he were not handicapped" (F-24). The placement resulted from "an unwritten . . . de facto policy . . . that the profoundly deaf must go to a center-based school" if they require interpreters (F-14,-22).

The Feasibility of Educating Michael at West Springfield High School with a Cued Speech Interpreter

The school board testified that it would entail "not a great cost" to provide an interpreter at Michael's community school, since there would be no need to hire another interpreter. Since 3 interpreters interpreted for 3 students at Annandale (F-9-10, F-14-15), the school board could reassign an interpreter to West Springfield (F-15). Trial testimony showed that if Michael were provided an interpreter at his community school, "it shouldn't be

any additional cost," since "[t]heir salary would be the same whether they work at Annandale or West Springfield."[17]

The school board easily could afford the marginal costs of providing Michael interpreter services at West Springfield. Realizing this, the school board focused not on Michael, but on *other* students (only 20 of whom cue, the remainder use sign language)(F-9) who, hypothetically, might request interpreters in their community schools as well (F-14). But the school board conceded at trial that any attempt to project how many deaf students actually would request that they attend their community schools if Michael were permitted to do so would be no more than "conjecture."[18]

The school board's concern about recruitment also was conjectural since requirements are being met – in fact, there was a surplus for the 1988-89 year, in spite of the lack of advertising for interpreters. While past hiring problems were due in part to poor hourly pay and fringe benefits,[19] salaried interpreters have now been hired for about half the positions.[20]

Any additional staff travel time would be manageable since interpreters already go from school to school (F-9). The school

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[17] Any added costs would be deminimus. For example, the school system could incur a small expense due to the interpreter's inability to service more than one student, as she did for one of Michael's 1989 classes, thereby saving 1/6 of an interpreter's time. An additional half hour of travel time could be incurred for a substitute for the rare occasion that the regular interpreter is unavailable. The school board commonly incurs such costs for other services that are provided itinerantly at community schools.

[18] The school board ventured that a third of the other students, or about 18, might make that request. That number is diminished further by the fact that *none* of the school system's preschool hearing impaired students event are provided interpreters, nor are many of its elementary and intermediate students, since their own teachers already sign or cue for them.

The school board projected "enormous" costs for resource teachers in community schools. But Michael excelled at West Springfield without resource assistance, as might many others. Moreover, students assigned to community schools could rely on resource teachers already assigned to those schools, as they do in the Montgomery County school system.

[19] Michael's interpreters all have been hourly employees, who have not been provided fringe benefits (F-9). The salary earned by Mrs. Barnett, working as an interpreter in 1988, was $9098.90.

[20] The school board's testimony unfairly combined cued speech with sign language, although there are many fewer cued speech students (F-9-10, -14-15), it is easier to train a cued speech interpreter, and no special training in the student's course is necessary to cue that course (F-8).

board found it feasible to permit its 175 hearing impaired students in its aural/oral program, who do not need interpreters, to attend their community schools; many are provided support services, such as resource teachers and speech therapists, itinerantly, at their community schools (F-14-15). The school board even provided cued speech services to a lone student at Poe Intermediate School. Yet, the school board refused to do the same at West Springfield for Michael.

In other school systems, such as neighboring Montgomery County, the practice is to provide cued speech interpreters at a student's community school, if requested as part of the IEP process. As a Fairfax official readily admitted at trial, "Montgomery County made a different decision than the kind of decision we made." Yet, the school board was able to demonstrate no adverse consequences on Montgomery County or on any other school system that has made that decision.[21]

Dr. Sontag, an administrator of disability programs on the national, state, and local levels, confirmed that other school systems provide similar services at community schools. If it is feasible for Montgomery County and other school systems, the school board here, managing one of the best financed systems, with an annual budget of over $1 billion, also can do it.

Prior Proceedings

In 1987, while Michael was in 8th grade, the Barnetts made several efforts to resolve this dispute informally[22] before requesting a hearing (F-17-18) conducted by Hearing Officer Floyd C. Bagley, who issued extensive Findings of Fact and Conclusions of Law (F-4-34), and ordered placement at West Springfield with an interpreter.[23]

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[21] The school board listed as a witness the administrator of programs for deaf students in Montgomery County, Sheila Doctors, suggesting she would be called to refute Michael's evidence about Montgomery County. Ms. Doctors was subpoenaed by the school board and was sitting in the courthouse during trial, but the school board never called her as a witness.

[22] Those efforts are set out by Hearing Officer Bagley (F-15-18).

[23] The Hearing Officer decision, based on 48 findings (F-4-18) and 43 legal conclusions (F-19-29), was delayed due to a malfunction in the school board's recording equipment (F-3). The Hearing Officer prepared findings assisted by notes and reviewing audible parts of the tape (F-3-4).

A review was requested and, in a brief decision that failed to take issue with the Findings of Fact of the Hearing Officer (App.G), the reviewer upheld the school board's policy (*id.*).

Michael filed a complaint in the District Court, invoking its jurisdiction pursuant to 20 U.S.C. § 1415, 28 U.S.C. §§ 1331, 1345, and 42 U.S.C. § 1983. The complaint sought an injunction and compensatory damages and demanded a jury trial. Michael filed motions for partial summary judgment and a preliminary injunction based upon the administrative record and several exhibits. The school board filed a cross-motion for summary judgment. The lower court denied the motions but advanced the trial to August 30, 1989.

On August 17, 1989, the school board moved to dismiss the damages claims and to strike the jury demand. On August 25, 1989, the court granted both motions, ruling from the bench:

> "I don't believe that it was the intent of Congress, and I don't believe it is the law, that simply because you have a review of an educational program under the handicapped, or the Education Act, that that automatically allows you just to throw in the other two acts, Section 504 and also a 1983 claim. . . . to maintain an action under 1983 there has got to be some allegation of separate and independent acts that have been done by the school board authorities that would be a violation of the child's rights other than simply whether or not the education program is provided at his neighborhood school . . . I think the same is true under Section 504. That if all the act amounted to there is simple reiteration of the allegations under the Education Act, that it just does not set forth a claim under that act."

Trial proceeded on August 30, 1989. The court, allowing little argument, denied Michael's motion to place the burdens of proof and production on the school board. The court overruled objections to the school board's conjectural evidence regarding the costs of interpreters for other students.

The court issued findings tracking the school board's proposed findings, and practically ignoring the Findings of Fact of Hearing Officer Bagley (F-4-18) and the substantial trial evidence concerning Michael's injuries. The court ruled that the school board could locate cued speech services where it chose, and then could insist that Michael commute to that school, without regard to the IEP process (E-7-8). Although the court made vague reference to "finite resources" (E-7), it made no

specific finding about the cost of an interpreter for Michael at West Springfield, or for other students who might request interpreters at their community schools. The court ruled that Michael "has not been denied the opportunity to participate in any program" (E-9).

Following trial, the school board agreed to permit Michael to attend West Springfield, but would not pay for his interpreter, that issue being left for resolution on appeal. Mrs. Barnett resigned her job to interpret for Michael. Michael's educational progress at West Springfield was excellent.

On January 28, 1991, the court below affirmed (App.A), in an opinion that ignored or misconstrued the major points raised by petitioner. Michael's central procedural argument was that each aspect of Michael's program, including its location, was to be discussed by his IEP team, with input from Michael and his parents. The lower court never mentioned this argument in ruling that the school system had the prerogative to remove such placement issues from the IEP process and determine them without the involvement of Michael's IEP team (A-9).

Regarding the substantive claims, the lower court ruled first that the burden was on Michael to "sho[w] that the state hearing officer was erroneous in finding that the program at Annandale was appropriate" (*id.*). The lower court devoted most of its opinion on the EHA (A-9-12) to explaining why Annandale was "appropriate," even though Michael never argued that the Annandale program was *in*appropriate, as the court acknowledged (A-6). Regarding the substantive EHA claim Michael *did* make, that EHA rules required Michael to be educated in the school he would have attended if he were not handicapped (34 C.F.R. § 300.552(c)), the court below ruled that "this section requires only that a school board take into account, as one factor, the geographic proximity of the placement" (A-11).

The court below failed to address Michael's § 504 burden of proof argument, that once he proved a prima facie case of exclusion from his community school, the burden should have shifted to the school board to show the necessity of that action. The court also failed to address Michael's substantive § 504 claims, that Michael was excluded, segregated, and provided different and inferior services at Annandale. The court bypassed these issues, ruling that § 504 required no "affirmative action" (A-13) to remedy such discrimination, and that removing the

discrimination would improperly entail a "substantial modification" (A-14) of the school board's programs.

The court below also held that since it affirmed the findings of the trial judge "we need not address plaintiffs' arguments regarding damages and the right to a jury trial" (A-14-15).

On February 10, 1991, a petition for rehearing and a suggestion for rehearing in banc was filed. On February 26, 1991, the court below ordered its opinion published (App.C). On March 8, 1991, the petition was denied (App.B). On June 3, 1991, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, extended the time for filing this petition to July 6, 1991.

REASONS FOR GRANTING THE PETITION

I. The Affirmance of the Trial Judge's Findings Without Addressing Petitioners' Contention That the Findings Should Have Been Made by a Jury Is Contrary to This Court's Holding in *Lytle v. Household Manufacturing*.

The court below thought (A-14-15) it "need not address plaintiffs' arguments regarding damages and the right to a jury trial" because it saw "no error in the district court's findings." In *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331 (1990), the Fourth Circuit similarly had ruled that, since it affirmed the trial court's findings, there was no need for a jury, regardless of the existence of a right to trial by jury.

In *Lytle*, this Court unanimously reversed, stressing that when, as here, "legal and equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.'" 110 S.Ct. at 1335, *quoting Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974). Had Michael's legal claims "remained in the suit, a jury would have been required to resolve those claims before the court considered the [equitable] claims, because 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.'" *Lytle*, 110 S. Ct. at 1335, *quoting Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). *Lytle* observed that it has "reversed and remanded each [such] case in its entirety for a trial before a jury." 110 S.Ct. 1337 (citing cases).

The only difference in *Lytle* was that there the Fourth Circuit rested its decision on the doctrine of res judicata. Here that court simply invoked its discretion to refuse to address the jury issue. *Lytle* divests the courts of such anomolous discretion. The inattention of the lower court to the *Lytle* decision, discussed in both of our briefs to the panel and in the petition for rehearing, provides a compelling reason to grant this petition.

II. The Holdings Below Refusing to Permit Petitioner's Damages Claims Or a Jury Trial Conflict with Decisions of This Court And Other Courts of Appeals.

A. *Damages Are Awardable Under the EHA.*

It is well-settled that a statute need "not in so many words provide for its enforcement by an award of money damages for the consequences of its violation." *Bivens v. Six Unknown Fed. Narc. Agents*, 403 U.S. 388, 396 (1971). Rather, "a general grant of jurisdiction . . . is sufficient to empower a federal court to grant a traditional remedy at law." *Id.* at 405 (Harlan, *J.*, concurring). The issue is *not* "whether the availability of money damages is necessary to enforce" the duty created, but whether there is an "explicit congressional declaration that persons injured" by a breach of the duty "may not recover money damages." *Bivens*, 403 U.S. at 397. An "explicit congressional declaration that persons in [petitioner's] position injured by . . . discrimination may not recover money damages from those responsible for the injury" is necessary to preclude damages. *Davis v. Passman*, 442 U.S. 228, 246-47 (1979).[24]

The EHA, far from *precluding* damages, "directs the court to 'grant such relief as [it] determines is appropriate.'" *School Comm. v. Massachusetts*, 471 U.S. 359, 369 (1985), *quoting* 20 U.S.C. § 1415(e)(2). "The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be 'appropriate.'" *Id.* at

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[24] *Accord, Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 207 (1944); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565-66 (1931); *Texas & P. R.R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). When Congress intends to preclude damages, it is capable of saying so expressly. *E.g.*, 42 U.S.C. § 2000a-3(a); 42 U.S.C. § 2000e-5(g).

369. The EHA's "statutory structure lends force to the inference that States were intended to be subject to *damages* actions for violations of the EHA." *Dellmuth v. Muth*, 491 U.S. 223, 235 (1990)(emphasis added), and "makes no distinction between civil actions based upon the type of relief sought." *Id.* at 237 (dissenting opinion). The Act "clearly shows by its language that monetary damages may be awarded,"[25] and three appellate courts have so held.[26]

Since the lower courts ignored the *Bivens/Passman* "unequivocal declaration" test, and since the holdings of the lower courts are contrary to those of three courts of appeals, the Court should grant this petition.

B. *Damages Are Awardable Under § 504.*

There is no dispute that § 504 prohibits practices that have a disparate impact on persons with disabilities,[27] and this Court has stated (without deciding the issue) that the "courts generally agree that damages are available under § 504," *Smith v. Robinson*, 468 U.S. 992, 1020 n.24 (1984)(citing cases). The trial court's decision to allow damages for disparate treatment violations, but not disparate impact (D-2), is senseless, especially in view of the *Bivens/Passman* obligation to "indulge the presumption that Congress intended that the full panoply of remedies be available to the private plaintiff under § 504."[28]

Congress had ample opportunity to amend § 504 to preclude damages for nonintentional discrimination, if that had been its design. The 1978 amendments to § 504 originally contained restrictions on the availability of monetary relief, but they were deleted by the Conference Committee. *Meiner v. Missouri*, 673

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[25] *Carter v. Indep. Sch. Dist.*, 550 F.Supp. 172, 174 (W.D.Okla.1981).

[26] *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir.1988), *vacated*, 492 U.S. 902 (1989); *Evans v. District No. 17*, 841 F.2d 824, 828 (8th Cir.1988); *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir.1981).

[27] 34 C.F.R. §§ 104.4(b)(4)(i),(ii); *Alexander v. Choate*, 469 U.S. 287, 292, 294-95 & n.11, 296-97 & n.17 (1985).

[28] *Nelson v. Thornburgh*, 567 F.Supp. 369, 383 (E.D.Pa.1983), *aff'd*, 732 F.2d 147 (3d Cir.1984), *cert. denied*, 469 U.S. 1188 (1985); *accord, Greater L.A. Council on Deafness v. Zolin*, 812 F.2d 1103, 1107 (9th Cir.1987)("full panoply of remedies, including . . . monetary damages"); *Meiner v. Missouri*, 673 F.2d 969, 977 (8th Cir.1982)("any available remedy"), *cert. denied*, 459 U.S. 909, 916 (1982).

F.2d 969, 978 (8th Cir.), *cert. denied*, 459 U.S. 909, 916 (1982); *Hurry v. Jones*, 560 F.Supp. 500, 511 (D.R.I.1983), *rev'd on other grounds*, 734 F.2d 879 (1st Cir.1984) (both cases citing [1978] U.S.CODE CONG. & ADM.NEWS 7312, 7375, 7379).

Shortly after the ruling in *Alexander v. Choate* that § 504 reached disparate impact, Congress enacted the 1986 amendments to § 504, 42 U.S.C. § 2000d-7(a)(2), abrogating 11th Amendment state immunity for actions under § 504, "including remedies . . . at law," to the same extent such remedies are available from other public and private entities. The Committee Report for the provision makes plain that "monetary damages" are a component of those remedies. S.REP.NO.388, 99th Cong.,1st Sess. (Aug.4,1986). Thus, in 1978 and in 1986, Congress had golden opportunities to limit the damages remedy available under § 504, but, far from doing so, it confirmed the availability of that remedy.

To allow full relief for an intentional breach of § 504, but only equitable relief when § 504 is violated negligently, is "inconsistent with prior case law in this area." *Hutchings v. Erie*, 516 F.Supp. 1265, 1268 (W.D.Pa.1981); *accord, Wilder v. City of New York*, 568 F.Supp.1132, 1136 (E.D.N.Y.1983). Nor can a showing of bad faith be a requisite for monetary recovery. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975).[29]

The complaint here in any event encompasses intentional discrimination. Because the complaint did not contain the magic word "intentional," the claim was dismissed. Even if intentional discrimination were required to sustain a damages claim, Michael should have been given a chance to make that showing at trial.[30]

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[29] Proof of intent and bad faith may be considered by the factfinder, along with a myriad of other factors, in deciding the *amount* to be awarded or whether to award exemplary damages. But a failure to show intentional discrimination cannot compel the dismissal of a § 504 damages claim.

[30] Fed.R.Civ.P. 8(a)(2)(complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); *id.* 8(e)(1)(pleading to be kept "simple" and "concise"); Adv.Comm.Rep. on Rule 8 (1955)(allowing "claim to be stated in general terms; the rules are designed to discourage battles over form of statement"); *Conley v. Gibson*, 355 U.S. 41 (1957)(no claim should be dismissed unless it appears to a certainty that plaintiff is entitled to no relief under any theory or set of facts that could be proven, resolving every doubt in favor of claimant); *Siegelman v. Cunard White Star*, 221 F.2d 189, 196 (2d Cir.1955)("not necessary to set out the legal theory on which the claim is based"); *Kowalewski v. Pennsylvania R.R.*, 141 F.Supp.

C. *Damages Are Awardable Under § 1983 for Violations of the EHA and § 504.*

In *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), the Court set forth the standard for deciding whether a plaintiff is precluded from bringing a § 1983 claim:

> "[I]f there is a state deprivation of a 'right' secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement."

Id., 423. "The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant," *Golden State Transit Corp. v. Los Angeles*, 110 S.Ct. 444 (1989), and "'[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right," *id., quoting Wright*, 479 U.S. at 423-24.

The trial court ignored *Wright*, ruling from the bench that it was improper "just to throw in . . . a 1983 claim," that "to maintain an action under 1983 there has got to be some allegation of separate and independent acts that have been done by the school board." The court held that "a § 1983 claim must do more than merely reallege a violation of the underlying statute to constitute a viable claim for damages" (D-2). This ruling manifests a fundamentally flawed understanding of § 1983.

No "separate and independent acts" must be alleged under § 1983; that was the point of *Maine v. Thiboutot*, 448 U.S. 1 (1980). In *Thiboutot*, § 1983 relief was allowed for a breach of a statute that itself provided for no judicial relief.

The trial court's distress about allowing Michael "to circumvent the carefully drafted, comprehensive legislative scheme embodied in the Education Act simply by alleging a § 1983 action to cover the same claim" (D-3) might be valid if *Smith v. Robinson*, 468 U.S. 992 (1984), remained the law. *Smith* held, as the lower court did here, for identical reasons, that "[t]he EHA is a comprehensive scheme" with a "carefully tailored" and "elaborate procedural mechanism." *Id.* at 1009-10.

However, "Congress read the Supreme Court's decision in *Smith* and acted swiftly, decisively, and with uncharacteristic

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565, 569 (D.Del.1956)("legal rights of plaintiff are to be determined by the law and the facts as established in the case and not by some language of the claim").

clarity to correct what it viewed as a judicial misinterpretation of its intent," *Fontenot v. Louisiana Bd. of Ed.*, 805 F.2d 1222, 1223 (5th Cir.1986), enacting the Handicapped Children's Protection Act (HCPA), 20 U.S.C. § 1415(f), to allow "remedies available under . . . other Federal statutes protecting the rights of handicapped children," including § 1983, which is to be maintained as a "separate vehicl[e]."[31] HCPA's purpose was to remove any "preemptive effect" that *Smith* held the EHA had over § 504 and § 1983, so long as EHA procedures were followed "before a parent or guardian filed a lawsuit." H.REP.No. 296, 99th Cong.,1st Sess. 4 (1985). "Congress stressed that its original aim had been to allow resort to other judicial remedies for claims based on the EHA." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir.1987)(citing committee reports). Three other courts of appeals have ruled the same.[32] The courts below pretended that none of this happened and that *Smith* still controls.

Petitioner recognizes the importance of the EHA scheme. But the trial court did not state why allowing § 1983 claims, *following* exhaustion of the scheme, would "circumvent" it. As explained in *Board of Educ. v. Diamond*, 808 F.2d 987, 995 (3d Cir.1986), reversing a ruling disallowing damages under § 1983, "Congress explicitly adopted the reconciliation of the several statutes proposed by the *Smith* dissenters."

Congress ordained that § 1983 relief be available following exhaustion. "Of course, even the existence of a comprehensive remedial scheme will not bar resort to § 1983, if Congress states that it did not want its enactment construed to restrict or limit the remedies otherwise available." *Mrs. W.*, 832 F.2d at 754. The school board cannot meet its stiff burden of showing under *Wright v. Roanoke* "that Congress intended to foreclose" Michael's § 1983 claim, as all available evidence points the other

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[31] H.REP.NO.296, 99th Cong.1st Sess.4 (1985); *accord*, H.CONF.REP.NO. 687, 99th Cong.,2d Sess.7, [1986] U.S.CODE CONG. & ADM. NEWS 1807, 1809 ("conferees' intent that actions brought under § 1983 are governed by this provision").

[32] *Hayes v. Unified Sch. Dist.*, 877 F.2d 809, 812 (10th Cir.1989); *Digre v. Roseville Schs.*, 841 F.2d 245, 250 (8th Cir.1988); *Board of Educ. v. Diamond*, 808 F.2d 987, 993 (3d Cir.1986).

way. In view of the contrary decisions of four courts of appeals, this Court should grant this petition and resolve the issue.[33]

III. The Allocation of the Burdens of Proof and Production by the Courts Below Is Contrary to Decisions of this Court and Other Courts of Appeals.

A. *The Lower Court Improperly Allocated the Burdens of Persuasion and Production Regarding the § 504 Claim.*

§ 504, the "bill of rights for the handicapped," 119 Cong.Rec. 7105 (1973)(Rep.Peyser), prohibits the exclusion or segregation of students with disabilities. 29 U.S.C. § 794. "As is apparent from its language, § 504 is intended to be part of the general corpus of discrimination law." *NYSARC v. Carey*, 612 F.2d 644, 649 (2d Cir.1979).

There is no dispute that the school board excluded Michael from his community school, thereby establishing Michael's prima facie case of discrimination. The lower court's decision forcing Michael to prove that that decision was unjustified (A-12-14) is contrary to the general corpus of discrimination law placing the burdens of persuasion and production on the defendant to explain the necessity for such conduct;[34] the burden is especially "heavy" when a student is excluded from a public educational program.[35] The burden should be on the entity that "has greater knowledge" of the program.[36] Four appellate decisions involving schools have rejected the lower court's allocation of the burdens of proof and production under § 504.[37]

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[33] If Michael has a legal remedy, he also has the right to a jury trial. *Curtis v. Loether*, 415 U.S. 189, 196 n. 11 (1974).

[34] *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. at 425; *Western Air Lines v. Criswell*, 472 U.S. 400, 420 n.29 (1985).

[35] *Green v. School Bd.* 391 U.S. 430, 439 (1968); *accord, O'Connor v. Board of Ed.*, 449 U.S. 1301, 1305 (1980)(Stephens,*Cir. J.*,in chambers); *cf. Plyler v. Doe*, 457 U.S. 202 (1982); *Brown v. Board of Ed.*, 347 U.S. 483, 494 (1954).

[36] *Prewitt v. U.S.Postal Service*, 662 F.2d 292, 306 (5th Cir.1981); *accord, Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir.1985).

[37] *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir.1981); *S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *NYSARC v. Carey*, 612 F.2d 644, 649 (2d Cir.1979);

The official administrative construction of § 504 also adopts this allocation of the burdens of proof and production:

> "A recipient [of federal assistance] shall place a handicapped person in the regular educational environment operated by the recipient unless it is *demonstrated by the recipient* that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 104.34(a).[38]

Decisions construing this rule also place the burdens on defendants.[39] Since the holding below is contrary to this rule and the well-settled case law, including four court of appeals' holdings, this petition should be granted.

B. *The Lower Court Improperly Allocated the Burdens of Persuasion and Production Regarding the EHA Claim.*

The court below similarly erred in placing upon plaintiff the burdens of proof regarding his EHA claim (A-9). That holding is not supported by analysis of the statute and rules, and is contrary to the holdings of two other courts of appeals.

The EHA rule requires the school board to "insure" that a student attend his community school unless his IEP "requires some other arrangement." 34 C.F.R. §§ 300.552(a)(3), (c). The Hearing Officer placed the burden on the school board (F-5,-21,-23), and two appellate courts have adopted that view.[40] That allocation is sensible in view of Congress' recognition that "in any disputes the school officials would have a natural advantage." *School Comm. v. Massachusetts*, 471 U.S. at 368.

Moreover, in a decision that guided the drafting of the EHA, *Mills v. Board of Ed.*, 348 F.Supp. 866 (D.D.C.1972), the court

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Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir.1977).

[38] "The[se] regulations particularly merit deference" since "the responsible congressional committees participated in their formulation, and both these committees and Congress itself endorsed the regulations in their final form." *ConRail v. Darrone*, 465 U.S. 624, 634 (1984). The congressional intent in the 1978 amendments to § 504 was to "incorporat[e] the substance of the Department's regulations into the statute." *Id.* at 634 n.15.

[39] *Hawaii Dep't of Ed. v. Katherine D.*, 531 F.Supp. 517 (D.Haw.1982), *aff'd*, 727 F.2d 809 (9th Cir.1983); *Charleston R-1 School Dist.*, [1982] Ed.Hdcp.L.Rep. 257:359, 360.

[40] *Grymes v. Madden*, 672 F.2d 321, 322 (3d Cir.1982); *S-1 v. Turlington*, 635 F.2d at 349.

held: "Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement, or transfer." *Id.* at 881. As this Court held in *Board of Ed. v. Rowley*, 458 U.S. 176, 180 n.2, 192 (1982), *Mills*, which Congress termed "landmark," was "the impetus for the Act." That *Mills* was "discussed at length in the legislative Reports suggests that the principles [it] established are the principles which to a significant extent guided the drafters of the Act." *Id.* at 194. Since the holding of the court below is contrary to the decisions of two appellate courts, and contrary to the landmark *Mills* decision, the Court should grant this petition.

IV. The School Board Violated Michael's Procedural Rights by Stripping His IEP Team of the Authority to Discuss or Determine the Location of His Educational Program.

The "centerpiece of the statute's education delivery system for disabled children" is the Individualized Education Program (IEP), which "guarantee[s] parents . . . an opportunity for meaningful input into *all decisions* affecting their child's education," from evaluation to placement.[41] The Act requires the IEP Team to tailor the child's program to his individual needs,[42] providing educational and related services and determining placement.[43]

The court below condoned the school board's violation of these procedures and allowed it to remove placement from the IEP process. Two members of Michael's team, a teacher and Michael's mother, testified there was no consideration, no discussion, no authority vested in the team to decide placement. Failure to involve parents[44] and other IEP team members "who

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[41] *Honig v. Doe*, 484 U.S. 305, 311 (1988); *accord, School Comm. v. Massachusetts*, 471 U.S. 359, 368 (1985)(the "modus operandi of the Act").

[42] 20 U.S.C. § 1401(16); *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir.1980), *cert.denied*, 452 U.S. 968 (1981).

[43] 20 U.S.C. §§ 1400(c),1401(17),1412(5)(B),1413(a)(3),1414(a)(1)(C)(iv); 34 C.F.R. § 300.551(b)(2); S.REP.NO.168, 94th Cong.,1st Sess.33, [1975] U.S.CODE CONG. & ADM.NEWS 1457; *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 889-93 (1984).

[44] *Town of Burlington v. Massachusetts*, 736 F.2d 773, 783 (1st Cir.1984)(exclusion of parents "drives a stake into the very heart of the Act"), *aff'd*, 471 U.S. 359 (1985); U.S. Bureau on Education of the Handicapped, [1978] Ed.Hdcp.L.Rep. 211:84, 85 ("placement decision must be made jointly

know [the student] best" in deciding placement is a "contravention of the procedural requirements" of the EHA.[45]

The school board stripped Michael's IEP team of the authority to render an individualized determination of Michael's placement needs, or to even consider the injuries he suffered from his exclusion from his community school. The school board categorically placed him in a different program simply because he required an interpreter. The school board concedes that that is its policy, and the Hearing Officer made numerous findings confirming that fact. Several appellate courts have held that such a "rigid rule under which defendants refuse even to consider" a placement option conflicts with the EHA.[46] In view of the conflict of the holding of the court below with at least four holdings of the courts of appeals, the petition should be granted.

V. Michael's Segregation and Exclusion from Benefits Offered Other Students in His Community Violated § 504.

The school board's treatment of Michael is a vestige of the ignominious, all-too-recent history of official exclusion and segregation of children with disabilities detailed above, pp. 2-4. Although the school board did not send Michael to a segregated institution, as it would have in the past, it still consigned him daily to a segregated "handicapped" bus, and imposed burdens on him that were not forced upon others. Only Michael was banned

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by the agency and the child's parent(s)"); Hearing Officer Decision (App.F).

[45] *Taylor v. Board of Ed.*, 649 F.Supp. 1253, 1257-58 (N.D.N.Y.1986); *accord*, *McKenzie v. Smith*, 771 F.2d 1527, 1532 (D.C.Cir.1985); *Hollenback v. Board of Ed.*, 699 F.Supp.658, 666 (N.D.Ill.1988); *Marathon County Handicapped Children's Education Board*, [1987] Ed.Hdcp.L.Rep. 352:47, 60.

[46] *Polk v. Susquehanna Cent. Intermed. Unit*, 853 F.2d 171, 177 (3d Cir.1988), *cert.denied*, 488 U.S. 1030 (1989); *accord, Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036, 1044 (5th Cir.1989)(Congress recognized that "no two children necessarily suffe[r] the same condition or requir[e] the same services or education"); *Martinez v. School Board*, 861 F.2d 1502, 1507 n.1 (11th Cir. 1988)("overriding rule . . . that placement decisions must be made on an individual basis" (*quoting* 34 C.F.R. § 300.552 (official comment))); *Battle*, 629 F.2d at 280 (across-the-board policy "incompatible with the Act's emphasis on the individual"); *see also* Bureau of Education of the Handicapped Policy Letter, [1978] Ed.Hdcp.L.Rep. at 211:85 ("placement decisions cannot be made on a class or categories basis"); Virginia Special Education Regulations, § 300.551, pp. 28-29 (cited in Hearing Officer Decision, App. F)(prohibiting optionless placements).

from his community school and compelled to spend 11-1/2 hours a week commuting to school, depriving him of time for school work, activities, and socializing with friends. Despite this different, plainly inferior treatment, the court below ruled there was no violation of § 504.

Whether these practices violated § 504 may be determined by comparing Michael's treatment with the treatment of other students. *See NYSARC v. Carey*, 612 F.2d at 649. The program imposed on Michael was discriminatory beginning with the transportation. Certainly making blacks ride on an identifiable "Negro" school bus would violate the Fourteenth Amendment, *Brown v. Board of Ed.*, 347 U.S. 483, 495 (1954)("Separate . . . facilities are inherently unequal"),[47] as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, since such a transportation arrangement would be nothing more than a "vestigial hallmark of segregation."[48] The 1978 amendments to § 504 expressly made such "rights" under Title VI "available" under § 504, 29 U.S.C. § 794a(a)(2). Requiring Michael to ride a segregated school bus with a sign on it saying "Reserved for the Handicapped" was no different, and no less reprehensible, than a sign hung on a row of classroom seats saying "Reserved for Colored." *See McLaurin v. Oklahoma*, 339 U.S. 637, 640 (1950). Such a badge of inferiority "serves only to call attention," *Henderson v. United States*, 339 U.S. 816, 825 (1950), to treatment Congress has prohibited.

§ 504's legislative history reveals the firm intent of the sponsors to end "the segregation of [disabled] Americans,"[49] as

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[47] By using in § 504, the term "discrimination," a word "associated with the 14th Amendment for nearly a century," and carrying with it a long history of judicial construction," *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976), Congress presumptively incorporated *Brown's* prohibition of unnecessarily segregated educational services.

[48] *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1041-43 (5th Cir.1986); *accord, Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 18 (1971); *Kemp v. Beasley*, 389 F.2d 178, 185-86 (8th Cir.1968).

[49] 118 Cong.Rec. 9495 (1972); *see also id.* 9497 ("[s]ociety has found it easy to segregate handicapped"); *id.* ("deliberate segregation of handicapped and their resulting invisibility . . . The issue at stake . . . deals with the basic relationship between handicapped people and the so-called 'normal' society"); *id.* 32,310 ("intent . . . to end the virtual isolation of [disabled] children and adults"); 117 Cong.Rec. 45,974-75 (1971) ("handicapped [are] . . . often shunted aside").

do the federal regulations.[50] Forcing Michael to ride the segregated "handicapped" school bus plainly violated § 504. *Van Buren Public Schools*, [1981] Ed.Hdcp.L.Rep. 257:269, 271.

It also was a discrimination to bar Michael from his community school. A requisite of non-discrimination is "admission to a school according to residence as a matter of right."[51] Excluding a student from a school "sets [plaintiff] apart from the other students," *McLaurin*, 339 U.S. at 641, in violation of the 14th Amendment and Title VI, and, therefore, § 504 as well. *See* 29 U.S.C. § 794a(a)(2).

A school is not just an edifice. Each school has its own unique reasons for being in a certain location. "People gravitate toward school facilities, just as schools are located in response to the needs of people." *Swann v. Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 20 (1971).

In enacting and amending § 504, Congress required public schools "'to share with handicapped Americans the opportunities for an education . . . that other Americans take for granted.'" *School Bd. v. Arline*, 480 U.S. 273, 277 (1987). The sponsors acknowledged that students with disabilities are "[a]ll too often excluded from schools and educational programs,"[52] and both the regulations[53] and the case law[54] agree that excluding a

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[50] *See* 34 C.F.R. §§ 104.4(b)(1)(iv), 104.4(b)(2); 28 C.F.R. §§ 41.52(b)(1)(iii), 41.51(b)(1)(iv), 41.51(b)(2) (prohibiting unnecessarily segregated services; 43 Fed. Reg. 2135 (1978) (prohibition of segregation "intrinsic to § 504").

[51] *Northcross v. Board of Ed.*, 302 F.2d 818, 823 (6th Cir.), *cert.denied*, 370 U.S. 944 (1962); *Broussard v. Houston School Dist.*, 395 F.2d 817, 821-22 (5th Cir.1968).

[52] S.REP.NO.319, 93d Cong.,1st Sess. 2 (1973); S.REP.NO. 1297, 93d Cong., 2d Sess. 50, [1974] U.S.CODE CONG. & ADM. NEWS 6406; *see also* 117 Cong. Rec. 45,974 (1971)(Vanik)(§ 504 to eliminate practices causing persons with disabilities to be "shunted aside" (*quoted in Choate*, 469 U.S. at 296)).

[53] 34 C.F.R. § 104.4(b)(3)("Despite the existence of . . . different programs or activities," a school system "may not deny a qualified handicapped person the opportunity to participate in such programs and activities that are not . . . different"). In a dispositive decision, the Chief of the government's Handicapped Discrimination Branch, which wrote the regulations, ruled that a school system

> "would not be in compliance with the Regulation if only one of three campuses were made accessible to physically handicapped students . . . We considered this concept during the writing of the Regulation, realizing that

student from his community school violates § 504. These judicial and administrative constructions are fully in accord with the congressional intent to insure "full integration of the handicapped into normal community living, working, and service patterns." 118 Cong.Rec. 3320 (1972)(Sen.Williams).

It also is plainly discriminatory to impose the 11-1/2 hours of weekly transportation time on Michael, when no nondisabled students are forced to travel nearly that long to school.[55] Such a practice that treats a student "differently,"[56] "places special burdens," and "disadvantages" on him so that he "receive[s] fewer benefits" than nondisabled students from the school system,[57] and the failure to make educational services "available to [him] on equal terms"[58] plainly violates the 14th Amendment and Title VI, no less so if the student is treated equally or even

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it appears to be cost efficient. We determined, however, that there is no way the resultant segregation could be defended under the statute. It would be comparable to segregation based upon race or sex." [1978] Ed.Hdcp.L.Rep. 254:06,07 (Aug.1,1978).

[54] *Doe v. Dolton Sch. Dist.*, 694 F.Supp. 440 (N.D.Ill.1988); *Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D.W.Va.1976).

[55] *Flax v. Potts*, 864 F.2d 1157, 1159-60 (5th Cir.1989)(fact that distance from home to school was only 2.3 miles not relevant in view of one hour length of trip); *Valley v. Rapides Parish School Bd.*, 702 F.2d 1221, 1228 (5th Cir.), *cert. denied*, 464 U.S. 914 (1983); *Northcross v. Board of Ed.*, 302 F.2d at 820 (30-45 mins.); *Bay Area Interm. School Dist.*, [1979] Ed.Hdcp.L.Rep. 257:46, 47 (122.2 mins. round trip).

[56] *Hunter v. Erickson*, 393 U.S. 385, 389 (1969); *McLaurin v. Oklahoma*, 339 U.S. 637, 638 (1950); *Oyama v. California*, 332 U.S. 633, 645 (1948); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

[57] *Hunter*, 393 U.S. at 391; *Lau v. Nichols*, 414 U.S. 563, 568 (1974); *Henderson*, 339 U.S. at 824; *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[58] *Brown v. Board of Ed.*, 347 U.S. at 493; *accord, Watson v. City of Memphis*, 373 U.S. 526, 533 (1963); *Mitchell v. United States*, 313 U.S. 80, 94, 97 (1941); *Missouri v. Canada*, 305 U.S. 337, 339 (1938).

superiorly in other respects.[59] As the federal regulations make plain,[60] such practices run afoul of § 504.

By providing different and inferior educational benefits, the school board committed the paradymatic § 504 violation, "treat[ing] handicapped persons less favorably than nonhandicapped persons." *Traynor v. Turnage*, 99 L.Ed.2d 618, 632 (1988). Because the school board refused to provide Michael the same system benefits provided others, it "undermine[d] the central purpose of § 504, to assure that handicapped individuals receive 'even-handed treatment' in relation to nonhandicapped individuals." *Id., quoting Alexander v. Choate*, 469 U.S. at 304. When a benefit -- here, the right to attend West Springfield if one resides in its attendance district, and the right to be free from 11-1/2 hours per week of extra commuting time to school[61] -- is provided others, "the same benefit" may not be denied students with disabilities, but must be "meaningfully and equally offered" to them. *Choate*, 469 U.S. at 308. It violates § 504 when a student with a disability "derive[s] fewer system benefits" from an educational activity. *NMARC v. New Mexico*, 678 F.2d at 853.

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[59] *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664, 226 P. 926, 928 (1924)(equal means "equal in all respects"); *Pearson v. Murray*, 169 Md. 478, 182 A.590, 592 (1936)("exclusion from any one privilege [to be] condemned"; *Neal v. Delaware*, 103 U.S. 370, 386 (1881)("all the civil rights" enjoyed by others). The provision of "substantially equivalent" -- or even higher quality -- educational services in another school simply does not remove the discrimination. *Sweatt v. Painter*, 339 U.S. 629, 632 (1950); *Missouri v. Canada*, 305 U.S. at 350; *see also Henderson v. United States*, 339 U.S. 816, 819-20 (1950)(railroad enjoined from providing black passenger excluded from dining car "superior" service at his seat). That Annandale High School also may offer quality educational programs is quite "beside the point." *Watson*, 373 U.S. at 538 (1963); *Missouri v. Canada*, 305 U.S. at 349 (1938).

[60] 34 C.F.R. § 104.4(b)(1)(ii)(impermissible to provide education "that is not equal to that afforded others"); *id.* § 104.4(b)(1)(iv)(prohibiting "different" programs); *id.* § 104.4(b)(1)(vii)(prohibiting practices that "limit" students "in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others"); *id.* § 104.33(b)(1)(i)(schools required to meet needs of students with disabilities as adequately "as the needs of nonhandicapped persons are met").

[61] These are the "relevant benefit[s]," *Choate*, 469 U.S. at 301 n. 21, Michael was "denied" under § 504. He "must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.* at 301.

The court below ignored all of this discrimination and segregation, interpreted language in *Southeastern Community Coll. v. Davis*, 442 U.S. 397, 411 (1979), as requiring "no . . . 'affirmative action'" (A-13), and held that providing Michael an interpreter at his regular school "in our view would constitute a 'substantial modification' of the Board's educational program" (A-14). The lower court ignored important clarifications to *Davis* set forth in *Choate* and in *Arline*.

In *Choate*, this Court noted that its use of the term "affirmative action" in *Davis* was an "unfortunate" and "severely criticized" choice of words, 469 U.S. at 300-01 n.20, and clarified that that term referred only to "modifications to existing programs" so "substantial" as to "constitute 'fundamental alteration[s] in the nature of a program'" that would jeopardize the very "integrity" of those programs." *Id.* at 300, 301 & n.20, *quoting Davis*, 442 U.S. at 410. The Court's latest decision, *School Board v. Arline*, 480 U.S. 273, 289 n.19 (1987), apparently overruled, finally, *Davis'* "affirmative action" prohibition, explaining that § 504 entails "an affirmative obligation" on school systems to insure meaningful access.

The Tenth Circuit has held that, a program modification does not reach the level of "fundamental alteration" unless it would "jeopardize the overall viability of the school system." *NMARC v. New Mexico*, 678 F.2d 847, 855 (10th Cir.1982). The cost of providing Michael an interpreter, however, would not come near that line. As the Hearing Officer found, it would entail "little or no cost" to provide an interpreter at Michael's community school (F-33). Moreover, it is plain from the record that providing Michael an interpreter would entail only minor alterations in the school board's program. According to the school board's own Cued Speech Coordinator, it would have little effect on interpreter services. The school board's practice actually is far closer to a "fundamental alteration" of its own program. The school board's argument is indeed extraordinary: That it may exclude Michael from the "particular package of benefits" it provides (*Choate*, 469 U.S. at 303) ordinarily to students, and impose on Michael a fundamentally different, segregated, inferior package of benefits.

The court below also ruled that both § 504 and the EHA permit the school board to consider hypothetical burdens that may be imposed if other students requested the same treatment as Michael (A-7-8). That holding is inconsistent with a long line of

decisions holding that the right to be free from discrimination is "a personal one" belonging "to each particular person," not "merely . . . a body of persons according to their numbers."[62] A minority student barred from an educational program must be admitted "whether or not other[s] sought the same opportunity." *Missouri v. Canada*, 305 U.S. at 351.

Most recently, in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978), the Court struck down as violative of the Civil Rights Act of 1964 a pension plan that discriminated on grounds of gender, even though the city proved that it would cost enormously more to provide equal benefits to females, reasoning in a manner directly applicable here that "the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." The same analysis was applied in *Piper v. Big Pine School Dist.*, 193 Cal. 664, 226 P. 926, 930 (Cal.S.Ct.1924), to a claim by a native American child barred from a community public school because an "Indian school" was available. The court gave short shrift to the school board's "economic or administrative burden" argument that if it admitted one such child it would have to admit every such child, holding that the student had a personal right to attend the community school, and the cost of educating the others should be "addressed to the legislative department of the state government," not to the court. As in *Mitchell v. United States*, 313 U.S. at 97, "the comparative volume of traffic cannot justify the fundamental right of equality of treatment" involved here.

Numerous cases construing the rights of persons with disabilities similarly have ruled that § 504 provides for personal, individual rights rather than group rights and "places a duty on school districts to individually consider the needs of each handicapped student within its jurisdiction."[63] The regulations agree. *See* 34 C.F.R. §§ 104.33(a), (b). Plainly, the school board "cannot employ an inflexible approach . . . as a means of

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[62] *Missouri v. Canada*, 305 U.S. at 351; *Mitchell v. United States*, 313 U.S. at 97; *Henderson v. United States*, 339 U.S. at 824; *see also Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *McCabe v. Atchinson,Topeka & Santa Fe Ry.Co.*, 235 U.S. 151, 161 (1914).

[63] *GARC v. McDaniel*, 511 F.Supp. at 1281; *accord*, *School Bd. v. Arline*, 480 U.S. at 287; *Strathie v. PennDOT*, 716 F.2d 227, 231-34 (3d Cir.1983); *NMARC v. New Mexico*, 678 F.2d at 854; *Maine Human Rts. Comm'n v. City of South Portland*, 508 A.2d 948, 955-66 (Me.Sup.Jud.Ct.1986).

allocating resources because to do so would violate the handicapped child's right to individualized consideration."[64]

The school board is beyond the era when it sent profoundly deaf students like Michael to isolated residential institutions. It now must end the remaining vestiges of that era, "root and branch." *Green v. School Bd.*, 391 U.S. 430, 438 (1968). This Court should grant this petition to insure that it does so.

VI. The School Board's Failure to Permit Michael to Attend His Community School Violated the EHA.

The court below devoted most of the EHA section of its opinion arguing that Annandale High School provided an "appropriate" program for Michael (A-9-12) even though there is no "appropriateness" issue in this case. It is beyond dispute that both programs at issue here are "appropriate" for Michael under *Board of Ed. v. Rowley*, 458 U.S. at 188-89. As the court below acknowledged (A-4), Michael has been attending West Springfield, and his progress there was excellent, even without the speech therapy and resource services provided at Annandale. Nor does Michael dispute that the program at Annandale is appropriate. As the Court of Appeals correctly observed in *Daniel R.R. v. Board of Education*, the substantive standard in *Rowley* is "ill-suited" for determining which of two appropriate programs are the proper placement for the child. 874 F.2d at 1045.

The holding of the court below regarding placement is contrary to the decisions of other courts of appeals that "it is fundamental to the scheme and purpose of the Act that handicapped children be provided the same educational opportunity" as nondisabled students. *Katherine D.*, 727 F.2d at 817. To deny a student access to his community school requires "a compelling educational justification." *Tokarcik*, 665 F.2d at 458. A central component of that guarantee is that students with disabilities be permitted to "go through the educational process with their peers," 20 U.S.C. § 1400(b)(4), and the school board

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[64] *Armstrong v. Kline*, 513 F.Supp.425, 427 n.2 (E.D.Pa.1980), *aff'd*, 629 F.2d 269 (3d Cir.1980); *accord*, *Mantolete v. Bolger*, 767 F.2d at 1423; *Shirey v. Devine*, 670 F.2d 1188, 1200, 1204 n.45 (D.C.Cir.1982); *Barnes v. Converse Coll.*, 436 F.Supp.635 (D.S.C.1977); *Connecticut Inst. for Blind v. Connecticut*, 176 Conn. 88, 405 A.2d 618, 621 (Conn.S.Ct.1978).

may remove children with disabilities from their regular schools "only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 20 U.S.C. § 1412(5). Unless Michael's IEP "requires some other arrangement," he is to be permitted to attend the school he would attend if he were not disabled. 34 C.F.R. § 300.552(c). Michael's IEP does not even discuss the location of his placement, let alone *require* some other arrangement.

"Congress plainly required schools to hire various specially trained personnel to help handicapped children" remain in their regular schools. *Tatro v. Texas*, 468 U.S. 883, 893 (1984). Such aides "serve as important facilitators of classroom learning." *Polk*, 853 F.2d at 176. Michael's need for such an aide cannot justify his exclusion from his community school, even though he may be the only deaf student there in need of that aide.[65]

The U.S. Dep't of Education has ruled that "[f]inancial concerns cannot be the basis for making a placement decision. For example, if a child could attend his own local school except for the need to provide an aide to assist him, it would be hard to justify sending that child to a more distant school." [1979] Ed.Hdcp.L.Rep. 211:84, 85. The Virginia Dep't of Education interprets that requirement the same way. "Clarification of Issues," *quoted at* F-32.

The Committee Report expressly "rejects the argument that the Federal Government should only mandate services to handicapped children if, in fact, funds are appropriated in sufficient amounts to cover the full cost of this education." S.REP.NO.168, 94th Cong.,1st Sess 22, [1975] U.S.CODE CONG. & ADM.NEWS 1425, 1446; *see also* 121 Cong. Rec. 37,025 (1975)(Rep.Mink); *id.* 19,503 (Sen.Cranston). Fund shortages "cannot be permitted to bear more heavily on the . . . handicapped child than on the normal child." *Mills*, 348 F.Supp. at 875-76. The school board "may not use lack of available funds as a justification" for not providing Michael essential

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[65] *In re Dixie School Dist.* [1983] Ed.Hdcp.L.Rep. 504:274, 277; *In re Frederick County Pub. Schools*, 3 Ed.Hdcp.L.Rep.503:191, 192-93 (1981); *see also Board of Ed. v. Mrs. D.G.*, [1984-85] Ed.Hdcp.L.Rep. 506:140, 142; *School Dist. #24 v. Husband & Wife*, [1984] Ed.Hdcp. L.Rep. 505:246; U.S. Office of Special Educ. Policy Letter, [1980] Ed.Hdcp.L.Rep. 211:249, 250.

educational services. *Parks v. Pavkovic*, 536 F.Supp. 296, 303 n.15 (N.D.Ill.1982). Congress decided that the cost "eventually redounds to the benefit of the public fisc as these children grow to become productive citizens." *Polk*, 853 F.2d at 181-82.

Of course, there are limits to what the EHA demands. It does not require a school "to modify the regular educational program beyond recognition." *Daniel R.R.*, 874 F.2d at 1048. But what here amounts to mere administrative convenience cannot overcome the strong congressional preference that a student not be removed from his regular placement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

January 28, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 89-2454, 89-2467

MICHAEL W. BARNETT, *et al.*,

Plaintiffs-Appellants,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Alexandria Division
(Hon. Claude Hilton)

Before SPROUSE and CHAPMAN, Circuit Judges, and NICKERSON, United States District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

Michael Barnett and his parents[1] appeal from the district court's order granting the Fairfax County School Board's motions to strike plaintiffs' claims for monetary damages and a jury, 721 F.Supp. 755, and the court's decision that the Board provided Michael with a free appropriate public education in the least restrictive environment at Annandale High School, as required by the Education of the Handicapped Act, as amended, 20 U.S.C. §§ 1400-1461 (1982) ("EHA" or the "Act"), and in accordance with Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"), 721 F.Supp. 757. We affirm the district court's ruling that the Board provided Michael with an appropriate education. We need not address the jury or damages issues.

I. BACKGROUND

Michael Barnett is a profoundly hearing-impaired high school student. He is eligible for special education as a "hearing impaired" student and has been educated in programs offered by the Fairfax County school system for hearing-impaired students since he was two years old. Fairfax County offers hearing-impaired students a choice of three hearing-impaired programs, including a "cued speech" program.[2] Fairfax County is one of only five local school systems to offer three different methodologies for educating hearing-impaired students, and one of the very few school districts to offer cued speech.

Since first grade, Michael has received special education utilizing a centralized cued speech program. This program is a comprehensive integrated program which runs from preschool through high school and involves interpreter services, speech and language therapy and resource teacher assistance. The

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[1] The Education of the Handicapped Act gives procedural rights to handicapped children and their parents. *See* 20 U.S.C. § 1415. References to Michael encompass his parents whenever appropriate.

[2] The cued speech method was originally introduced at the request of Michael's parents and the parents of several other hearing-impaired students.

high-school level cued speech program is located at Annandale High School ("Annandale").

Michael has thrived in the cued speech program. With the aid of a cued speech interpreter and other support services, Michael has been increasingly mainstreamed into regular classes. During Michael's freshman and sophomore years, Michael attended Annandale, and with the assistance of cued speech interpreters, he was fully mainstreamed with nonhandicapped students in all of his academic classes. Michael also received daily support from a certified teacher of the hearing impaired, as well as speech and language therapy several times per week. Michael excelled at Annandale academically, and he participated in extracurricular activities as a member of the Annandale baseball and basketball teams.

Michael and his parents concede that the cued speech program at Annandale provides Michael with an appropriate and high quality program. Plaintiffs, however, object to the location of the cued speech program at Annandale rather than at Michael's base school, West Springfield High School ("West Springfield"). Since 1987, plaintiffs have requested that the Fairfax County School Board establish the cued speech program at Michael's base school. Because Annandale is approximately five miles farther from Michael's home than his base school, Michael's placement at Annandale required additional travel time.[3]

The Board denied Michael's initial request to duplicate the program at West Springfield. Michael and his parents appealed this decision through the administrative process provided by the EHA. An administrative hearing was held in December 1987 and a local hearing officer issued a decision on June 16, 1988, requiring the Board to provide Michael with cued speech services at West Springfield. The Board appealed this decision to a state administrative hearing officer. After conducting another

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[3] The parties dispute the amount of additional travel time involved. Plaintiffs contend that Michael traveled 11 1/2 hours per week to attend Annandale. Defendants, on the other hand, claim that Michael traveled approximately 3 1/2 hours more per week to Annandale than he would if he were placed at West Springfield.

hearing,the state hearing officer ruled that the Board was not required to duplicate at West Springfield the cued speech services offered at Annandale.

Michael and his parents then filed this action in the district court seeking an injunction requiring the Board to provide cued speech services for Michael at West Springfield and requesting compensatory damages in excess of $100,000. Before trial, the court granted the Board's motions to strike the plaintiffs' claims for monetary damages and a jury. After a bench trial, the court entered judgment in favor of the Board upholding the state hearing officer's decision that the Board's policy of providing high school cued speech services only at Annandale was appropriate and that Michael should attend school there. The court found that, in light of the scarcity of highly-trained personnel and resources, the small number of students utilizing the cued speech program, and the educational advantages of centralizing the program at Annandale, the Board had fulfilled the EHA requirements by providing Michael with a cued speech program at Annandale. The court also ruled that the Board did not discriminate against Michael by placing him at Annandale. The court then entered judgment in favor of the Board and dismissed the complaint.

On September 5, 1989, plaintiffs withdrew Michael from the cued speech program at Annandale. Michael currently attends West Springfield where he receives private interpreter services.

On appeal, plaintiffs argue that the district court erroneously held that the Board provided Michael with a free appropriate educational program at Annandale and that the Board was not required to duplicate this program for Michael at West Springfield. After a careful review of the record, we find that the Board fully complied with the EHA's procedural requirements and we affirm the district court's decision that the Board offered Michael an appropriate program at Annandale. We also find that neither the EHA nor Section 504 required the Board to duplicate the cued speech program for Michael alone at his community school. We first address plaintiffs' arguments under the EHA and then we turn to Section 504.

II. THE EHA

A. Statutory Background

The EHA requires that all states receiving federal assistance ensure that each disabled student in the state receive a "free appropriate public education." 20 U.S.C. § 1412(1)(1982). In pertinent part, the Act defines a free appropriate public education as:

> special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, . . . [and] (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. at § 1401(18). The educational program offered by the state must be tailored to the unique needs of the handicapped child by means of an "individualized education program" ("IEP"). *Id.* at § 1414(a)(5). The IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. *Id.* at § 1401(19). The IEP is prepared at a meeting between a representative of the local school district, the child's teacher, the parents or guardians, and whenever appropriate, the disabled child. The IEP must be reviewed and, where necessary, revised at least once a year in order to ensure that local agencies tailor the statutorily required "free appropriate public education to each child's unique needs." *Id.* at § 1414(a)(5).

Although the state must place a child in "the least restrictive environment," 34 C.F.R. § 300.552(d), the Act and regulations do not establish specific guidelines defining the IEP's substantive content. The Act, however, requires that handicapped children be educated in regular classrooms with nonhandicapped children to the greatest extent possible. 20 U.S.C. § 1412(5)(B). Educating a handicapped child in regular classrooms with nonhandicapped children is known as "mainstreaming."

The EHA also imposes extensive procedural due process requirements upon the participating states. Complaints brought by parents or guardians must be resolved at "an impartial due process hearing." *Id.* at § 1415(b)(2). Any party dissatisfied with the state administrative hearing officer's decision may bring a civil action in state or federal court. *Id.* at § 1415(e)(2). In such an action, the district court must conduct an independent review based on the preponderance of the evidence. In doing so, however, the court must give "due weight . . . to [the state administrative] proceedings." *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

A party's complaint under the EHA is subject to a two-step inquiry to determine: (1) whether the school system has complied with the Act's procedural requirements; and (2) whether the school system has offered an "appropriate" program, *i.e.*, one which is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07.

Our first inquiry is whether the Board complied with the EHA's procedural requirements in refusing to duplicate the cued speech program for Michael at his base school. We then turn to the question of whether the district court correctly found that the program offered at Annandale was "appropriate."

B. Procedural Compliance

Plaintiffs contend that the Board's unspoken "policy" of categorically placing at Annandale all high school handicapped students using the cued speech method violates the EHA's requirement that each student's IEP address the individual needs of that student. In essence, plaintiffs challenge the Board's authority under the EHA to centralize the high school level cued speech program at Annandale. The Board rejects this argument, as did the district court and the state administrative hearing officer, and argues that the use of a small, resource intensive, centralized program for handicapped children in Michael's situation does not violate the EHA's procedural requirements. The Board points to the educational, financial and resource advantages of centralizing this type of program. The Board

further contends that it has provided Michael with a high quality program at Annandale that allows him to be mainstreamed as close as reasonably possible to his home.

The district court agreed with the Board and found that in light of the scarcity of highly-trained personnel and resources, the small number of students utilizing the cued speech program, and the educational advantages of centralizing the program at Annandale, the Board had fulfilled the EHA requirements by providing Michael with a cued speech program there. In making this finding, the court stated:

> The Cued Speech program is a specialized one utilized by a small number of students drawn not merely from Fairfax County, but from the entire Northern Virginia area. The program has been established at a network of centrally-located elementary, intermediate, and high schools in order to maximize scarce economic and human resources, particularly qualified interpreters. The school system is not required to duplicate the Cued Speech program for Michael alone merely because there exists a high school which is slightly closer to his house or one he would rather attend. . . .
>
> The school system can and must consider the effect of providing a specialized program to one student at his base school upon the rights of other similarly-situated students to demand the same treatment. There are presently at least 78 other hearing impaired students who have or will use interpreters. Were an exception made for Michael, these other students would also expect that they be provided with their own interpreter at their respective base schools. The school system could not provide individual interpreters for each student at his or her base school. While a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the

> school system. *Rowley*, 458 U.S. at 208. Indeed, a school district which offers the "total communication" methodology need not also offer the Cued Speech method at all.
>
> The court should consider the educational reasons why a program is established in centralized fashion. Here, having all interpreters, teachers, therapists, and students together in an ongoing program allows staff interaction, accessibility, and provides much greater cohesiveness. (Citations omitted.)

At the outset, we note that Congress made two deliberate legislative decisions in enacting the EHA. First, Congress chose to leave the selection of educational policy and methods where they traditionally have resided -- with state and local school officials. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. at 207-08. In addition, Congress's goal was to bring handicapped children into the public school system and to provide them with an education tailored to meet their particular needs.

We believe that a congressional mandate that dictates the substance of educational programs, policies and methods would deprive school officials of the flexibility so important to their tasks. Ultimately, the Act mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials.

Applying these principles to the facts of this case we affirm the district court's decision. We do not agree with plaintiffs that the Board failed to consider Michael's individual needs in placing him at Annandale, and we also reject plaintiffs' suggestion that the EHA requires the Board to duplicate at Michael's base school a highly specialized education program because Michael's base school is a few miles closer to his home. Adopting plaintiffs' position would require us to intrude upon the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials

are far better qualified and situated than are we to make. Moreover, we believe that when devising an appropriate program for individual students, a school system may consider the feasibility of such a program. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983); *Department of Educ. of Hawaii v. Katherine D.*, 727 F.2d 809, 813 (9th Cir.1983), *cert. denied*, 471 U.S. 1117 (1985); *Gillette v. Fairland Bd. of Educ.*, 725 F.Supp. 343, 346 (S.D.Ohio 1989), *appeal dismissed*, 895 F.2d 1413 (6th Cir.1990). Accordingly, we affirm the district court's decision on this point.

C. Appropriateness of Program at Annandale

Plaintiffs also challenge the appropriateness of the cued speech program at Annandale. First, plaintiffs argue that the district court improperly placed on them the burden of proof in showing that the state administrative hearing officer was erroneous in finding that the program at Annandale was appropriate. Next, they contend that the Board's failure to establish cued speech services for Michael at West Springfield violates the EHA's requirement that the Board provide Michael with a "free appropriate public education." The Board, however, claims that the program at Annandale is appropriate for Michael. The Board also argues that the EHA does not require it to set up the cued speech program for Michael alone at his base school.

We reject plaintiffs' argument that the district court incorrectly placed on them the burden of proof. In a previous case, we noted in a footnote that in an EHA action seeking to overturn a decision by a state hearing officer, the party challenging the hearing officer's decision properly bears the burden of proof in showing that the officer's decision was erroneous. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, n. 2 (4th Cir.1988), *cert. denied*, 489 U.S. 1016 (1989). We see no reason to depart from our prior finding, and thus we hold that the burden is properly allocated to the party challenging the administrative decision below. Because plaintiffs challenged the state hearing officer's decision in the district court, the court properly placed on them the burden of proof.

Regarding plaintiffs' argument that the program offered at Annandale was inappropriate, we note that in *Rowley* the Supreme Court defined an appropriate program as consisting of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. at 188-89. In essence, an appropriate education is one which allows the child to make educational progress. *Martin v. School Board*, 3 Va.App. 197, 210, 348 S.E.2d 857 (1986).

Based on our careful review of the record, we conclude that the district court correctly held that the program at Annandale was an appropriate education given the terms of the Act. As the court noted, Michael's scholastic record at Annandale and his participation in interscholastic sports demonstrated that he had received "tremendous educational benefit from the cued speech program" at Annandale. Significantly, plaintiffs have also conceded that "Michael's program at Annandale is of high quality, and that he is receiving an appropriate education there."

The program at Annandale also satisfies the EHA's preference for "mainstreaming" handicapped children in their educational placement. *See* 20 U.S.C. § 1412(5)(B). In *DeVries v. Fairfax County School Bd.*, 882 F.2d 876, 878 (4th Cir.1989), we recognized the importance of mainstreaming, noting that "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act."

In this case, the evidence clearly demonstrates that the Board complied with the Act's mainstreaming requirements by placing Michael at Annandale. Annandale is not a "center" attended only by hearing-impaired or other handicapped students; it is a regular public high school. Michael was enrolled in regular classes comprised of nonhandicapped students, and his cued speech program integrated him with nonhandicapped students for all nonacademic activities.

Despite their concession and the clear record below, plaintiffs, nonetheless, contend that the Board had a duty under

the EHA to duplicate interpreter services provided at Annandale at Michael's community school. Plaintiffs argue that the EHA requires the defendant to place Michael as close as possible to his home. They also suggest that unless Michael's IEP requires some other arrangement, he should be permitted to attend the school he would attend if he were not disabled, *i.e.*, West Springfield.

As already noted, a placement is to be made in the "least restrictive environment" given the child's unique educational needs and the placement's "potential harmful effect." 34 C.F.R. § 300.522. To support their argument, plaintiffs rely on two regulations promulgated under the Act. These regulations provide that a placement be made "as close as possible to the child's home" and unless the "child's [IEP] requires some other arrangement," that the placement be made "in the school [the child] would attend if not handicapped." *Id.* at § 300.552(a)(3), (c). The official comment to these regulatory directives provides in relevant part as follows:

> [A]mong the factors to be considered in placing a child is a need to place the child as close to home as possible. Recipients are required to take this fact into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to the placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program.

In light of these comments, we do not interpret this section as imposing upon a school board an absolute obligation to place a child in his base school. Rather, this section requires only that a school board take into account, as one factor, the geographical proximity of the placement in making these decisions. *See Pinkerton v. Moye*, 509 F.Supp. 107, 112 (W.D.Va.1981) (adopting similar interpretation).

Here, the Board fully complied with this section by placing Michael at Annandale. Michael's IEP requires the cued speech program, which is available at Annandale, and there is no school nearer than Annandale which provides these services.

Plaintiffs also argue that the district court erroneously allowed the Board, in making placement decisions, to consider the lack of financial resources and the impact on the other students of providing one student an interpreter. The district court found that in light of the finite resources available for the education of handicapped children, a school system is not required to duplicate a small, resource-intensive program at each neighborhood school.

Although we agree with plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, "appropriate" does not mean the best possible education that a school could provide if given access to unlimited funds. *See Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. at 199 ("to require . . . the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go"); *Department of Educ. of Hawaii v. Katherine D.*, 727 F.2d at 813 (EHA does not require that states provide the best possible education for handicapped children). Because the Act requires the state to establish "priorities for providing a free appropriate public education to all handicapped children," we find that Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions. 20 U.S.C. § 1412(3); *Doe v. Anrig*, 692 F.2d 800, 806 (1st Cir.1982)(in determining appropriate placement of an individual handicapped child, the child's needs must be weighed against the realities of limited public monies); *Pinkerton v. Moye*, 509 F.Supp. at 112 ("competing interests must be balanced to reach a reasonable accommodation"). Consequently, in reviewing the defendant's placement decision, the district court correctly considered these factors and properly found that the program offered at Annandale was appropriate.

III. SECTION 504

Plaintiffs argue that the district court erroneously found that the Board did not violate Section 504 of the Rehabilitation Act

for two reasons. First, plaintiffs contend that by excluding Michael from attending his neighborhood school the Board violated Section 504. The Board argues that it did not discriminate against Michael because he has not been denied the opportunity to participate in any program.

Section 504 provides in relevant part:

> No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a) (West Supp.1990).

In failing to find a Section 504 violation, the district court relied on *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Interpreting Section 504, the *Davis* Court held that a nursing college did not discriminate against a hearing-impaired applicant by failing to provide her with a nursing instructor, or by excusing her from courses that presented difficulties because of her hearing impairment. The Court unanimously held that no such "affirmative action" was required by the "language, purpose, [or] history of § 504." *Id.* at 411.

Unlike the nursing student in *Davis*, in this case Michael had the opportunity to participate fully in the public educational program offered by the Board. Considering that the college's failure to provide a nursing instructor to the handicapped student in *Davis* did not violate Section 504, we are constrained to conclude that plaintiffs have not made out a claim of unlawful discrimination under Section 504.[4]

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[4] Plaintiffs rely on three cases to support their argument that Michael has been denied access to any educational program. We find the cases inapposite. In these cases, the federal recipient either refused to provide any interpreter service to the handicapped student or denied the child access to a regular public classroom situation. *See Rothschild v. Grottenthaler*, 907 F.2d 286, 293 (2d Cir.1990); *Barnes v. Converse College*, 436 F.Supp. 635, 636-37 (D.S.C.1977); *Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D.W.Va.1976). In the present case, however, the Board

Plaintiffs' second contention posits that centralizing the cued speech services for high school level handicapped students violates Section 504. The district court specifically rejected this argument and so do we. We believe, as did the district court, that the Board's decision to centralize the cued speech service at Annandale was reasonably based.

Moreover, the Supreme Court stated in *Davis*:

> Section 504 by its terms does not compel educational institutions . . . to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reasons of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.

Southeastern Community College v. Davis, 442 U.S. at 405. Requiring the Board to provide every hearing-impaired student with his interpreter of choice at his base school, instead of at mainstreamed but centralized locations, in our view would constitute a "substantial modification" of the Board's educational programs. Accordingly, we affirm the district court's ruling on this point.

IV. CONCLUSION

In sum, we see no error in the district court's finding that the Fairfax County School Board provided Michael with an appropriate public education at Annandale and that the Board was not required to duplicate this program at Michael's community school under either the EHA or Section 504. Therefore, we need not address plaintiffs' arguments regarding damages and the right

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provided Michael with the cued speech program at Annandale.

to a jury trial. We see no merit in plaintiffs' remaining arguments.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

ORDER OF THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

March 8, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 89-2454, 89-2467

MICHAEL W. BARNETT, *et al.*,

Plaintiffs-Appellants,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Alexandria Division
(Hon. Claude Hilton)

Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Chapman and Judge Nickerson.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX C

ORDER OF THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT THAT ITS OPINION BE PUBLISHED

February 26, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 89-2454, 89-2467

MICHAEL W. BARNETT, *et al.*,

Plaintiffs-Appellants,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
Alexandria Division
(Hon. Claude Hilton)

ORDER

The Court amends its opinion filed January 28, 1991, as follows:

On the cover sheet, section 1 -- the status is changed from "unpublished" to "published."

On page 2, section 5 -- the status is corrected to read "Affirmed by *published* per curium opinion."

For the Court - by Direction

/s/ John M. Greacen
Clerk

APPENDIX D

MEMORANDUM OPINION OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

August 28, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MICHAEL W. BARNETT, *et al.*,

Plaintiffs,

v. Civil Action No. 89-0567-A

THE FAIRFAX COUNTY SCHOOL BOARD,

Defendants.

HILTON, District Judge. This matter came before the court on defendants' motions to strike plaintiffs' claims for damages and to strike plaintiffs' jury demand in a case involving the special education treatment of Michael Barnett, a 16-year-old profoundly deaf student. In the case, plaintiffs maintain that although the educational program presently offered Michael is appropriate, it is the duty of the school system to provide that same program at Michael's neighborhood school. Plaintiffs' Complaint alleges a cause of action under the Education For All Handicapped Children Act ("Education Act"), as well as parallel claims under § 504 of the Rehabilitation Act of 1973 ("§ 504") and 42 U.S.C. § 1983 ("§ 1983"). In addition to seeking equitable relief, plaintiffs have asked for monetary damages in excess of $100,000 for the alleged mental and emotional distress

which Michael has supposedly incurred as a result of attending a school other than his neighboring one.

In light of existing authority as well as persuasive policy considerations this court is of the opinion that both of defendants' motions should be granted. With regard to the issue of damages, it has been clearly established that aside from reimbursement to parents for private tuition, compensatory damages are not recoverable under the Education Act. *See e.g. Hall v. Vance County Board of Education*, 774 F.2d 629, 633 n. 3 (4th Cir.1985). To allow otherwise, would in effect create a cause of action for "educational malpractice," subjecting the already limited budgets of school systems to added expense. *See Anderson v. Thompson*, 658 F.2d 1205, 1211-13 (7th Cir.1981). This was not the intent of Congress in creating the Education Act. *Id.*

Moreover, like the Education Act, § 504 does not create any general tort liability for educational malpractice. *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir.1982). In addition, the Supreme Court has warned against a court's substitution of its own judgment for educational decisions made by state officials. *See Id.* Thus, this court is of the view that before damages can be sought for basic education claims such as those under § 504, there must be a showing of bad faith or intentional discrimination. *See e.g. id.* and *Timms v. Metro School District*, 722 F.2d 1310, 1318 n. 4 (7th Cir.1983). As no such allegations have been made in this particular case, plaintiffs' claim for damages under the Rehabilitation Act also must fail.

Finally, this court believes that plaintiffs cannot predicate a claim for damages under § 1983 solely upon the same violations of the Education Act and § 504 which do not afford damages in this particular case. Although the Education Act makes clear that a plaintiff can also pursue claims under § 1983, that section is a derivative cause of action, creating a private right of action only for deprivation of federal rights enunciated elsewhere. *Maine v. Thiboutot*, 448 U.S. 1 (1980). Thus, this court is of the view that a § 1983 claim must do more than merely reallege a violation of the underlying statute to constitute a viable claim for damages. If the case were otherwise, plaintiffs would be able to

circumvent the carefully drafted, comprehensive legislative scheme embodied in the Education Act simply by alleging a § 1983 action to cover the same claim.

Plaintiffs have brought a case meriting review of the school system's special education treatment of a handicapped student. While equitable relief may be sought under the Education Act and § 504, damage claims are inappropriate to this particular case. Thus, defendants' motion to strike plaintiffs' damages claims and consequently defendants' motion to strike the jury demand should be granted.

An appropriate Order shall issue.

ORDER

This matter came before the court on the defendant's motion to strike plaintiffs' claims for damages and defendant's motion to strike plaintiffs' jury demand. For the reasons stated in the enclosed memorandum it is hereby

ORDERED that both of defendants' motions are GRANTED and the case shall proceed to trial on claims under the Education Act and § 504 of the Rehabilitation Act without a jury.

APPENDIX E

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

September 7, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MICHAEL W. BARNETT, *et al.*,

Plaintiffs,

v. Civil Action No. 89-0567-A

THE FAIRFAX COUNTY SCHOOL BOARD,

Defendants.

HILTON, District Judge.

FINDINGS OF FACT

1. Michael Barnett is a sixteen-year-old young man who has suffered from a profound hearing loss in both ears since he was a young child, and is eligible for special education as a "hearing impaired" student. He has been educated in programs offered by the school system for hearing impaired students since he was two years old.

2. The school system began offering "Cued Speech" when Michael was in first grade. Michael has been educated in centralized Cued Speech programs offered by the school system

continuously at the elementary, intermediate, and high school level. With the aid of a Cued Speech interpreter and other support services, Michael was increasingly mainstreamed into regular classes. He now takes all his academic classes with nonhandicapped students, with the assistance of a Cued Speech interpreter, and has been selected for the Annandale High School basketball and baseball teams.

3. The Cued Speech method was originally introduced at the request of Michael's parents and the parents of several other hearing impaired students. When the Barnetts and other parents requested that the Cued Speech program be separated from other hearing-impaired programs to avoid any potential for student confusion, the school system separated the programs.

4. For the past two years, Michael has attended Annandale High School in Fairfax County, and is fully mainstreamed with nonhandicapped students in all his academic classes, through the provisions of the "Cued Speech" interpreters available at that school. He also receives a special resource class one period per day from a full-time staff teacher of the hearing impaired, as well a speech and language therapy several times per week from a therapist who is part of the program.

Plaintiffs concede that the Cued Speech program at Annandale provides Michael with an appropriate and high quality program. Plaintiffs' sole objection to that program is that it is provided only at Annandale, rather than at Michael's base school, West Springfield High School. Annandale is 5.1 miles farther from Michael's home than is West Springfield High School. Annandale's attendance area borders West Springfield's.

5. The Cued Speech program is one of three different educational methodologies which the school system offers for the benefit of more than 300 hearing impaired students that it serves. The other methodologies are the "Total Communication" method, in which communication takes place in signed English, and the "Auditory/Oral" method, which involves communication strictly by the use of lip-reading and use of residual hearing. Fairfax County is one of the very few school districts in the country which offers Cued Speech at all, and one of only five local school districts in the nation (out of approximately 14,000

districts) which offers three different methodologies for teaching hearing impaired students.

6. The location of each individual hearing-impaired student's program varies according to the intensity of the services he requires. Students who utilize the Auditory/Oral approach have less severe hearing impairments, and rely on lip-reading. They do not require the service of an interpreter and many are served in their base schools. Students in the Total Communications and Cued Speech programs have hearing impairments which range from severe to profound. These student require interpreters in order to participate in regular classes.

7. The Cued Speech program is a comprehensive, integrated program which runs from preschool through high school. According to their abilities and needs, many students, aided by Cued Speech interpreters, are mainstreamed into regular academic classes with nonhandicapped students. In addition to interpreter services, students receive speech and language therapy from a trained clinician, and resource assistance from one of two trained teachers of the hearing impaired who are on the full-time staff. The program is overseen by an administrative staff which hires, schedules, and trains interpreters, arranges for coverage of absent interpreters, and monitors and supervises the resource teachers, interpreters, speech therapists and other program personnel.

8. To provide students with the personnel and other services they require, the Cued Speech and Total Communication programs have been established at centrally-located schools which are close to one another, and close to major transportation arteries. The schools also make up a natural feeder network, so that students continue through the grades with their nonhandicapped classmates. The Cued Speech program has been established at Canterbury Woods Elementary School, Poe Intermediate School and Annandale High School, which are within 4.5 miles of one another. The Total Communication program has been established at Mantua Elementary, Frost Intermediate, and Woodson High School. Students in the Fairfax County Total Communication and Cued Speech programs come from across the county, as well as from other counties.

9. There are 22 students, and three full time, five part time, and one substitute interpreters in Cued Speech, and 56 students, and 12 interpreters in Total Communications.

10. The school system has established the Cued Speech program at centralized locations because of the educational advantages involved. Centralization allows the resource teachers, speech and language therapists, and other special education staff to connect, share information, and support one another on a regular basis, and whenever needed. It allows the regular teaching staff to build experience in serving hearing impaired students. These advantages cannot be duplicated by providing a student with periodic assistance of itinerant teachers or therapists. Centralization also allows the school system to maximize its use of resources, particularly interpreters, for the benefit of all the hearing impaired students. In the Cued Speech program, the eight interpreters must serve 18 students. Having these students in a single series of schools allows one interpreter to cover more than one student at a time. Having the program schools so close together also allows interpreters to travel from one school to the other with a minimum of lost travel time. This also allows interpreters in the same school to substitute for one another, or to substitute at one of the other two program schools, in case of absences. It allows the school system to effectively manage and supervise the resource teachers, therapists, interpreters, and other personnel who serve students. In addition, it allows the school system to effectively plan for the needs of future students.

11. Qualified interpreters are in short supply. During the 1988-89 school year, for example, and despite efforts to find substitute interpreters, fifteen of Michael's classes alone were forced to go uncovered when interpreters were absent. It would not be possible for the school system to provide qualified interpreters at each neighborhood school for the many students who need them.

12. Michael has, at Annandale, maintained a "B" average. He has participated in extracurricular activities as a member of the Annandale basketball team and baseball team. Michael gets along well with his teachers, coaches, and classmates, and has made many friends at Annandale.

13. Plaintiffs filed a request for a local administrative hearing on September 15, 1987. An administrative hearing was held in December, 1987. A local hearing officer issued a decision on June 16, 1988, requiring the school system to provide Michael Cued Speech services at West Springfield. This decision was appealed to a state administrative hearing officer. Because a malfunction of the audio tape recorder had made much of the local hearing testimony inaudible, the state hearing officer conducted another hearing in order to hear personally the testimony of most of the original witnesses for both parties.

14. On August 4, 1988, the state hearing officer issued his decision. He ruled that "the Fairfax County Public Schools has proposed an educational program at Annandale that is a free appropriate public education in the least restrictive environment". The state hearing officer ruled that the school system, having offered Cued Speech services at Annandale, was not required to duplicate those services at West Springfield.

CONCLUSIONS OF LAW

The School Board's obligation to provide special education derives from a statutory basis, Va. Code § 22.1214, and the Education of All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.* (the "Education Act"). The Education Act was intended to provide handicapped children the same "basic floor of opportunity" in primary and secondary education which is enjoyed by nonhandicapped students. *Board of Education v. Rowley*, 458 U.S. 176, 201 (1982).

A school system's fundamental obligation under the Education Act is to offer a "free appropriate public education." 20 U.S.C. § 1412. In *Rowley* the Supreme Court set out a two-part analysis for determining whether this obligation has been met. First, the court must determine whether the school system has complied with the procedures required by the Act. 458 U.S. at 206-07. Second, the school system must offer an "appropriate" program, i.e., one which is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207 at 3051.

An "appropriate" program is one which allows the child to make educational progress. *Martin v. School Board*, 3 Va.App. 197, 210, 348 S.E.2d 857 (1986). Here, Michael has not only progressed from grade to grade, but has maintained a "B" average in rigorous regular classes, and has participated in two interscholastic sports. Michael's record at Annandale demonstrates that he has enjoyed tremendous educational benefit from the Cued Speech program there.

The burden of proof here is on the plaintiffs to prove that the state hearing officer's decision, finding that the school system had offered an appropriate program in the least restrictive environment, was erroneous. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 n. 2 (4th Cir. 1988). A number of factors weigh against such a finding in this matter.

The Education Act, 20 U.S.C. § 1412(5)(B), articulates a preference for "mainstreaming" handicapped children in their education. *See, e.g. Lachman v. Illinois State Board of Education*, 852 F.2d 290, 294 (7th Cir.1988). Michael is, and has been, fully and successfully mainstreamed. Annandale is not a "center" attended only by hearing impaired or other handicapped students; it is a regular public high school. Nor is Michael in special classes solely for handicapped students. Every one of the academic classes in which Michael has been enrolled is a regular class made up of nonhandicapped students. Michael's program at Annandale allows him to be with the nonhandicapped students for all nonacademic activities including lunch, physical education, and extracurricular activities such as basketball and baseball.

The Education Act's "least restrictive environment" provisions do not create an absolute duty. They are, rather, one consideration in the ultimate calculus of whether a program is appropriate. *Martin v. School Board*, 3 Va.App. at 201, 348 S.E.2d at 860. *Lachman v. Illinois State Board of Education*, 852 F.2d at 295; *Town of Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir.1984). Specifically, 34 C.F.R. § 300.552(a)(3) and § 552(c) do not create any absolute duty to place a child in his base school. These provisions require only that a school system take into account geographical

proximity in making placement decisions, and that where more than one appropriate program exists, the school system provide the one closest to the child's home. *Pinkerton v. Moye*, 509 F.Supp. 107, 112-13 (W.D.Va.1981); 34 C.F.R. § 300.552, Official Comment 2. Here the school system has complied with these regulations, since Michael's individualized education program requires the Cued Speech program, which is available at Annandale, and there is no school nearer than Annandale which provides these Cued Speech services.

The obligation to provide education in the "least restrictive environment" does not turn upon the strength of a particular student's desire to attend another school.

In view of the finite resources available for the education of handicapped children, a school system is not required to duplicate a small, resource-intensive program at each neighborhood school. A school district may establish centralized programs. *Pinkerton v. Moye*, 509 F.Supp. at 112; *Troutman v. School District of Greenville, South Carolina*, EHLR Dec. 554:487 (D.S.C.1983). The Cued Speech program is a specialized one utilized by a small number of students drawn not merely from Fairfax County, but from the entire Northern Virginia area. The program has been established at a network of centrally-located elementary, intermediate, and high schools in order to maximize scarce economic and human resources, particularly qualified interpreters. The school system is not required to duplicate the Cued Speech program for Michael alone merely because there exists a high school which is slightly closer to his house or one he would rather attend.

The plaintiffs contend that Michael has lost self-esteem, is frustrated about attending Annandale High School, and that his verbal IQ has dropped, as have his grades. Michael has testified that his loyalties lie with West Springfield, and he wants to attend school there and be a part of the baseball and basketball teams. While Michael may be frustrated that he cannot choose his high school, there is no evidence of problems with Michael's performance. A proper reading of his test scores does not indicate any decrease in performance. His grades at Annandale remain good. He remains involved with sports. There is no

support in the evidence for the notion that he would receive a better education at West Springfield, nor is there support for the idea that social relationships would be better. Michael has many friends in his neighborhood and at Annandale. He is well liked and gets along well with students and teachers at Annandale. He is well motivated in his team sports.

The school system can and must consider the effect of providing a specialized program to one student at his base school upon the rights of other similarly-situated students to demand the same treatment. *Troutman v. School District of Greenville*, EHLR Dec. 554:487, 490 (D.S.C.1983). There are presently at least 78 other hearing impaired students who have or will use interpreters. Were an exception made for Michael, these other students would also expect that they be provided with their own interpreter at their respective base schools. The school system could not provide individual interpreters for each student at his or her base school.

While a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. Indeed, a school district which offers the "total communication" methodology need not also offer the Cued Speech method at all. *See Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir.1988).

The court should consider the educational reasons why a program is established in a centralized fashion. *Troutman v. School District of Greenville*. EHLR Dec. 554: 487, 489-90 (D.S.C.1983). Here, having all interpreters, teachers, therapists, and students together in an ongoing program allows staff interaction, accessibility, and provides much greater cohesiveness.

Compliance with Education Act regulations establishes compliance with § 504 of the Rehabilitation Act. Compliance with the Education Act's "least restrictive environment" provisions conclusively establishes compliance with the parallel § 504 regulations. *St. Louis Developmental Disabilities Treatment Center v. Mallory*, 591 F.Supp. 1416, 1464-71 (W.D.Mo.1984)

aff'd, 767 F.2d 518 (8th Cir.1985); *Darlene L. v. Illinois State Board of Education*, 568 F.Supp. 1340, 1347 (N.D.Ill.1983).

The plaintiff has not been subject to discrimination on the basis of his handicap, since he has not been denied the opportunity to participate in any program. *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979). He has now, and he has had in the past, a full opportunity to receive an education in courses of his choice, using the methodology of his choice, in classes with nonhandicapped children at a school five miles farther than his base school is from his home. The school system has provided extensive accommodations to allow him to be educated with nonhandicapped students in a neighboring school.

Centralizing the provisions of interpreter services to students at only one of several schools in a system does not violate § 504, *Community College of Denver*, EHLR 257:117 (1979), since it allows one interpreter to serve more than one student at the same time. To assign an interpreter on a one-to-one basis would deprive other handicapped students.

The school system has concentrated its provisions of interpreters, both Cued Speech and Total Communication, at a network of schools in order to allow itself to provide special services effectively to all hearing impaired students who need it. This reasonable judgment does not violate § 504. The Fairfax County Public Schools has provided a free appropriate public education in the least restrictive environment for this plaintiff, and judgment should be entered for the defendants.

An appropriate Order shall issue.

APPENDIX F

OPINION AND ORDER OF THE HEARING OFFICER

June 16, 1988

VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL AND COMPENSATORY EDUCATION

POST-HEARING REPORT
FORMAL DUE PROCESS HEARING

Fairfax Count Public Schools School Division	Mr. and Mrs. James E. Barnett Names of Parents
Dr. Robert S. Spillane Division Superintendent	Michael Barnett Name of Child
Thomas J. Cawley, Esquire Counsel Representing School	John C. Lenahan, Esquire Counsel Representing Parents
Floyd C. Bagley, Esquire Hearing Officer	Mr. and Mrs. James E. Barnett Hearing Initiated By

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I. ISSUE (S) AND PURPOSE OF THE HEARING: Placement of a 10th grade hearing-impaired child in his neighborhood school in the least restrictive environment.

Dates: December 14, 1987 Beginning: 10:00 A.M. Conclusion: 1:00 P.M.	December 14, 1987 Beginning: 2:00 P.M. Conclusion: 5:00 P.M.
Duration of Proceedings: 3 hours (e.g. hours,days)	Duration of Proceedings: 3 hours (e.g. hours,days)

FAIRFAX COUNTY PUBLIC SCHOOLS

In the Matter of Michael W. Barnett

II. *List of Witnesses*

For LEA (FCPS)

1. Dr. Donald McGee, Fairfax Public Schools, Program Specialist, Hearing Impaired Programs

2. Ms. Kate Tobin, FCPS, Hearing Impaired, Teacher

3. Ms. Valerie Lewis, FCPS, Speech and Language Therapist

For Mr. and Mrs. Barnett

1. Mr. Stuart Layman, Parent of Hearing Impaired Student

2. Ms. Mary Elsie Daisy, President, National Cued Speech Association

3. Mrs. Cindy Barnett, Parent

4. Dr. Terry Edelstein, Private Evaluator, Educational Diagnostician

5. Mr. James Barnett, Parent

II. a. *Procedural Matters*

This hearing was originally scheduled within the 45-day requirement on October 30, 1987, continued by agreement of the parties to December 14, 1987, documents submitted by the parties 5 days prior thereto, submission of proposed findings and conclusions agreed by counsel to be submitted on January 20,

1988, with extension granted due to inaudibility of copies of the hearing tapes to January 27, 1988, then further continued due to parents request for a verbatim transcript on the latter date with counsel submissions ordered filed with the undersigned 15 days following receipt of the transcript.

On February 29, 1988, I was informed by the FCPS that the hearing tapes were in the hands of a court reporter for transcription to be provided upon completion. On April 22, 1988, counsel for parents wrote me requesting I grant the relief requested based upon a denial of administrative due process because the transcript had not been prepared. By hand-delivered letter of May 3, 1988, counsel for FCPS wrote me that the Court Reporter would not certify a transcript and part of the delay in informing FCPS of this development was due to sickness but that he, the reporter, had spent some 60 hours listening to the tapes but until May 2, 1988, although portions of the tape were audible he could not certify as accurate transcripts of any of the witnesses. Counsel for FCPS offered to expedite any rehearings I might feel were necessary and I again reviewed my notes and the tapes. On May 18, 1988, I wrote both counsel informing them I would hear any authority for me to levy the sanctions requested by counsel for the parents, but that I was preparing my opinion and invited their submission of argument or proposed findings.

On May 24, 1988, hand-delivered from Mr. John F. Cafferky, Esquire, counsel for FCPS, simultaneously delivered to Mr. Lenahan, Esquire, counsel for the parents, was argument and authority that I could not grant the relief requested as no prejudice had resulted to the child, enclosing his memorandum on the merits. By telephone, counsel for the parents informed me he was preparing proposed findings and conclusions and I agreed not to finalize my opinion without consideration thereof.

Mr. Lenahan submitted, by letters of June 1 and June 2, received by me on June 3, 1988, very complete and comprehensive, professionally prepared proposed findings of fact, conclusions of law and enclosures of case authority, *on the merits*.

In large part, my findings are those submitted by parents' counsel and have considerably shortened the process of formulating my opinion in this somewhat troubling matter of first impression involving parents' unilateral request to mainstream a hearing impaired student into his neighborhood high school under applicable law and regulations as applied to the child's unique circumstances.

The record in this case consists of documents submitted pre-hearing by counsel, hearing tapes, post-hearing submissions of counsel, and this post-hearing report of decision and opinion of the hearing officer.

The parents in this case, as represented by their able attorney, stated at the hearing that they were desirous of Michael attending West Springfield High School in the 1988-89 school year as it was too late to expect his enrollment for the 1987-88 school year. I find that, notwithstanding the inordinate, unprecedented delay, sufficient time remains for any state level review of this decision and that they have not suffered substantial prejudice therefrom in view of FCPS good faith effort to acquire a verbatim transcript.

III. FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

The above-captioned matter came on for hearing before Floyd C. Bagley, Hearing Officer, selected from a list maintained by the Executive Office of the Supreme Court of Virginia, beginning at 10:00 a.m. on Monday, December 14, 1987, in the Belle Willard Administrative Center, 10310 Layton Hall Drive, Fairfax, Virginia 22030. The hearing was conducted in accordance with the Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia.

Thomas Cawley, Esquire, Hunton & Williams, P.O. Box 1147, Fairfax, Virginia 22030, appeared on behalf of the Fairfax County Public Schools ("FCPS") at the hearing, aided by John F. Cafferky, Esquire, post-hearing. John C. Lenahan, Esquire, Lenahan & Volpe, P. C., 3975 University Drive, Suite 400, Fairfax, Virginia 22030, appeared on behalf of James E. and

Cynthia A. Barnett ("parents") and Michael W. Barnett ("Michael").

STATEMENT OF ISSUE

Whether the FCPS has, by a preponderance of the evidence, overcome the legal presumption created by Federal and State law, that Michael Barnett must be provided a free and appropriate public education in the least restrictive environment, to wit, his neighborhood school, with other children who are not handicapped, in view of Michael's individual needs.

FINDINGS OF FACT

1. Michael W. Barnett was born on April 24, 1972, to James E. and Cynthia A. Barnett. He resides at 6914 Raspberry Plain Place, Springfield, Virginia 22153, in Fairfax County, within the boundaries of West Springfield High School, the public high school for students in Fairfax County who live in the Barnett's neighborhood. Michael's sister, Rochelle, who is 21 years old, attends Northern Virginia Community College.

2. Michael has Lived in West Springfield since he was four years old, i.e., for eleven years. The Barnetts plan to live in this area indefinitely and remain at their current residence until Michael finishes high school.

3. Audiological tests reveal that Michael has a severe to profound bilateral sensori-neural hearing loss. His primary handicapping condition is Deaf/Hard of Hearing (D/H). His residual hearing is amplified to 25 to 45 dBHL aided by the bilateral hearing aids. Michael has some facility with lipreading and is adept in a method of communication for the hearing-impaired known as cued speech, which employs visual cues to differentiate non-observable verbal sounds. Michael expresses himself orally and employs standard English grammar to articulate his thoughts. His speech is intelligible, his cadence is deliberate, and his flexion is flat.

4. Michael has no other health problems. He is at age level in his social, emotional and motor development. He possesses

average or above-average intelligence. He is achieving excellent academic progress, functioning at or above grade level in all academic areas, and working well independently. His latest grades (3/31/88) at Annandale High school, where he is currently enrolled as a 9th grade student, were two As and two Bs for academic subjects, and an A in health and physical education. In 8th grade, Michael was the recipient of a Presidential Academic Award for earning 3.5 GPA and 80 percent SRA scores. His intermediate school achievement reports are comparable to early high school standing, i.e., all As and Bs with the exception of one C+ in 7th grade math. His elementary school academic record was also excellent.

5. Behaviorally, Michael presents as a poised, self-confident, non-effusive adolescent. In a psycho-educational evaluation conducted by Dr. Terry Edelstein, Ph.D., in November 1987, Michael possessed competency to converse and respond in the evaluation without benefit of a cued speech interpreter, depending on lipreading, visual and some written cues.

6. Psychological evaluations of Michael have been completed triennially by FCPS in order to fulfill State requirements for his continuance in a special education program. On the most recent evaluation, 1985, Michael is described as "a sensitive young man with high achievement needs, both academically and in sports." Excellent academic and social progress are noted. Self-consciousness or anxious behavior was described as observed but currently under control with Michael employing humor, sports, and fantasy as vehicles for release of his anxiety and tension. Prior to the employment of cued speech, Michael had demonstrated severe frustration.

7. James Barnett, Michael's father, has a Master's Degree in Technology of Management and is the Director of Information Systems for the Air Line Pilots Association. Cynthia Barnett, Michael's mother, is employed as a cued speech interpreter by FCPS primarily at Annandale High School and as needed at Beech Tree Elementary School. Mrs. Barnett interprets for Michael in only one class at Annandale. Otherwise, she interprets for other students.

8. Since learning of Michael's hearing loss, Mr. and Mrs. Barnett have devoted themselves to learning about hearing impairment through reading, consultation with experts and attendance at conferences, seminars and meetings. They are active members in HEAR NOVA and in various support groups for parents of hearing-impaired children in the FCPS. They have played a significant role in the adoption of cued speech in the FCPS special education program for the hearing-impaired. They have readily shared with the FCPS the knowledge they have gained concerning the education of the hearing-impaired and, in a general way, the specific knowledge they have from experts regarding Michael's hearing impairment.

9. Mr. and Mrs. Barnett's goal for Michael is that he be educated with his hearing peers in his neighborhood school. Cued speech and auralism/oralism (speaking) is the mode of communication they have chosen for Michael; other choices were sign language or total communication, which is a combination of sign language and speech reading. Auralism/Oralism was chosen so that Michael will be able to function as fully as possible in the hearing world and to enable his family, teachers, friends and associates to impart their knowledge to him in their own language.

10. Cued speech was developed in 1966, by Dr. R. Orin Cornett at Gallaudet University in Washington, D.C., the only liberal arts institution for higher education of the deaf in the United States. Cued speech is a system which clarifies lipreading and promotes the continued growth of lipreading skills. It identifies each of 40 distinctive speech sounds. Eight shapes of one hand identify consonant sounds; four locations near the chin identify vowel sounds. A hand shape and location together cue a syllable. The speech movements combine with the cued information to make each syllable clear.

11. Cued speech is special in that information on the lips is only supplemented, not duplicated by information available from the hand; you cannot "read" the hand alone. Cued speech is true to its name; a person derives about half of the information from the cues, about one-half from the mouth. It is an ideal tool for aiding lipreading, making the 600,000 English words available

after only a few hours of training. It is compatible with aural/oral and total communication philosophies, enhancing instruction and communication in each mode. Among the advantages of cued speech are that even profoundly deaf persons make significant and continuing improvement in understanding syllables, words, and sentences. As exposure to cued speech continues, lipreading improves in cued and non-cued communications. Cued speech does not detract from the processing of auditory information. It breaks through the confusion of incomplete and distorted sound, helping the hearing-impaired person decode the sound he/she hears. Children tested after using cued speech for four or more years are comfortable with the structural elements in language and use them correctly. Such children are surpassing norms for hearing-impaired students. Better language skills improve decoding and reading comprehension. Most hearing persons can learn the system with eight to fourteen hours of instruction. Fluency develops with practice and use. Hearing-impaired children and adults often can learn cued speech as rapidly as hearing persons.

12. The average hearing-impaired adult reads at slightly above the third grade level. A profoundly hearing-impaired child with unimpaired intellectual ability can learn to read and can otherwise learn at the same rate as his or her hearing peers with the use of special strategies and methodologies which have only been used in deaf education in the past 10 to 20 years. The spoken language must be learned and it can be learned by a hearing-impaired child in the same developmental sequence as a hearing child through the use of cued speech and intervention strategies designed for speech therapists and teachers of the hearing-impaired to adapt materials developed for hearing children.

13. There is no need for cued speech interpreters to have any special expertise or background in any course material. In cued speech, the spoken language is simply cued and knowledge of the subject matter is not necessary. Thus, a proficient cued speech interpreter can interpret for a student in the sciences, mathematics and foreign languages, without any special training, education or experience in any of these subjects. None of the

FCPS cued speech interpreters has requested to be assigned to certain subjects or relieved of interpretation in certain subjects.

14. The FCPS has hired cued speech interpreters to work with the hearing-impaired students who use cued speech. The FCPS currently employs 9 cued speech interpreters, and is presently seeking to hire more. Although they are now considered hourly employees and receive a salary only, without fringe benefits, FCPS has decided to hire full time interpreters who will receive the pay and fringe benefits of such employees. This is intended to facilitate hiring and retaining cued speech interpreters as FCPS employees. At present, there are a total of 20 students in the FCPS who are using cued speech, 3 of whom are high school students, 4 of whom are preschool and 13 of whom are elementary school students. Michael is one of the 3 high school students.

15. Cued speech interpreters currently travel from school to school based on need. For example, Mrs. Barnett interprets at Beech Tree Elementary School and Annandale High School.

16. FCPS has provided special education services for Michael since age 2 when he was enrolled outside of his neighborhood in the preschool hearing program at Franconia Elementary School in North Springfield. Michael was thereafter enrolled outside of his neighborhood in Camelot Elementary School in the FCPS special education program for hearing-impaired aural/oral students. It was there that the cued speech program for the hearing-impaired was introduced into the FCPS 10 years ago, in 1978, and Michael was one of the first students enrolled in that program. While at Camelot, Michael only attended classes with other hearing-impaired students. Later, in second grade, all hearing-impaired elementary students using cued speech, including Michael, were transferred to Beech Tree Elementary School where Michael began to take mainstream classes with special education services, including a cued speech interpreter, resource teacher, and speech therapist. His academic and social progress were excellent and he eventually rose to intermediate level and attended Poe Intermediate School.

17. At Poe, Michael continued his mainstreaming with the same special education services provided at Beech Tree

Elementary. During this period, Mr. Charles Welch, Michael's resource teacher, told the Barnetts that the goal of the hearing impaired program in the FCPS was to enable hearing impaired students to attend their home-based school. Personnel in the FCPS Department of Student Services and Special Education have also led the Barnetts to believe that Michael would not be treated differently just because he uses a cued speech interpreter, and that his individual abilities and level of functioning would be the criteria by which FCPS would decide whether or not Michael could attend his neighborhood school.

18. Beginning in Beech Tree Elementary School, Michael developed the strong desire and the will to ultimately graduate from the center-based schools that he was attending for the hearing-impaired, to his neighborhood high school, West Springfield, where he could complete his public education with his friends who were not hearing-impaired.

19. The current special education services provided by FCPS for Michael include a cued speech interpreter for all of his mainstream academic classes, a speech therapist, and a resource teacher. Michael spends approximately 55 minutes each week with his speech therapist and along with another student attends a resource class for one period or 50 minutes each day. However, because of the time that the resource teacher spends with the other student, and the time that Michael spends with the speech therapist, and the time Michael also takes from his resource period to study for his academic subjects, the time that Michael actually spends working individually with his resource teacher amounts to approximately 14 minutes per day and 70 minutes per week.

20. Michael's resource teacher and speech therapist at Annandale High School do not cue any lessons or instructions to Michael. He relies on auditory and lipreading skills to communicate with them.

21. Michael's latest Individual Education Program ("IEP") dated September 10, 1986, provides for a continued placement in the programs for hearing-impaired aural/oral (cued speech) students. Resource support, including cued speech interpretation for regular education classes, is to be provided, and 83 percent of

Michael's education is to be provided in general education including mainstreaming in all academic subjects. His IEP for September 1987 to September 1988 has not yet been competed, pending the outcome of these due process proceedings. Thus, the existing IEP dated September 10, 1986 continues in effect.

22. Unlike other hearing students and oral hearing-impaired students who are permitted to attend their neighborhood schools in FCPS and receive all of their educational and, where required, special educational services, Michael is compelled to lead two separate lives, one at home and in his neighborhood, and the other one at a center-based school.

23. The psycho-educational evaluation by Dr. Terry Edelstein assessed Michael's personal and social needs. FCPS, however, has failed to conduct such an evaluation of Michael's individual needs in order to determine the least restrictive environment and what is a free appropriate public education for him.

24. Michael Barnett is a hearing-impaired adolescent with high average intelligence, above-average academic performance and pronounced achievement and affiliation needs. He demonstrates significant strengths intellectually, academically, and behaviorally. Some of his strengths are in areas not typically identified as areas of competence among his hearing-impaired peers. Michael's strengths linguistically and behaviorally are significant in that they facilitate movement in an educational and social mainstream which are often elusive for individuals with hearing deficits. Michael is an adaptive individual, striving to confront life's challenges.

25. Although FCPS contends that Michael's best interests lie in attending a center-based school where his resource teacher can consult with his classroom teachers, such consultation is available to an itinerant resource teacher if Michael should attend his neighborhood school. Also, Michael's parents are able to consult with his neighborhood school teachers and this consultation process would be facilitated by Michael's attendance in his neighborhood school.

26. Michael has a very positive attitude in school, but also has very strong feelings about being part of his own

neighborhood. These sentiments have been expressed by Michael for several years and were confirmed in the 8th grade when, despite his keen interest and athletic ability, he refused to meet with Annandale athletic coaches when they visited Poe Intermediate School to discuss their sports program with the rising 8th graders. Indeed, Michael was and still is willing to forego his participation in the Annandale basketball program in order to attend his neighborhood school.

27. Each one of the witnesses called by the FCPS at the due process hearing, including Dr. Donald McGee, Program Specialist-Hearing-Impaired, Kate Tobin, Resource Teacher-Hearing-Impaired, and Valerie Lewis, Speech and Language Clinician, agreed that it is essential to Michael's education that his individual needs be met.

28. Distance-wise, Annandale High School is eleven miles from the Barnett's home while West Springfield High School is only one mile. Moreover, due to the traffic congestion in the Northern Virginia area, the travel time from the Barnett's home to Annandale High School is 35 to 40 minutes in normal rush hour traffic, and when there is no traffic to contend with the travel time is still approximately 20 minutes. By comparison the travel time to West Springfield High School from the Barnett's home is only five minutes.

29. Although Michael was a member of the Annandale High School Freshman basketball team, he does not participate in other extracurricular activities due to the difficulty of arranging transportation and the time required to travel to and from his home and school. Basketball practices and games are scheduled from 4:00 p.m. to 6:00 p.m. on Monday, Tuesday, Thursday and Friday, from 7:00 p.m. to 9:00 p.m. on Wednesday, and from 8:00 a.m. to 10:00 a.m. on Saturday. Late bus services offered by FCPS are scheduled three days a week and depart from Annandale High School at 4:00 p.m. Thus, practice schedules for the basketball team do not permit Michael to use the late bus. Moreover, other transportation options such as car pooling with neighborhood students or walking are not available to Michael. The Barnetts have no alternative but to drive Michael to and from his basketball practice six days per week if he is remain part of

the basketball team at Annandale. Michael spends one hour and twenty minutes in travel time to and from school each day, plus one hour six days a week for basketball practice. Therefore, a total of twelve hours and forty minutes per week is devoted to travel time to and from Annandale High School in participation by Michael in one sports program. This puts undue stress on Michael and his family and eliminates the possibility of Michael's participation in any additional high school activities or any community activities with his neighborhood friends. It also substantially reduces the available time he has for homework. Michael also plays baseball and thus the additional time required to transport him to and from practice and games is expected to create the same stresses and deprivations as is now occasioned by his participation in the Freshman basketball program at Annandale.

30. As an example of the advantage of attending his neighborhood school, Michael's counsel called the parent of a deaf student who is in the total communication program in the FCPS. She is permitted to attend her neighborhood high school, and due to the convenience of the school to her home her attendance there has afforded her the opportunity, which she has utilized, to participate in a variety of extra curricular school programs.

31. FCPS has organized its special education program for the hearing-impaired on three tracks: aural/oral (lipreading), cued speech, and total communication (sign language and lip-reading). The cued speech program is part of the aural/oral program. All students in the aural/oral program, both cued speech and non-cued speech, are mainstreamed into regular classes, depending upon the individual student's level of functioning, at the center-based schools.

32. FCPS states that all special education children are treated equally and that the FCPS has the same objective for all hearing-impaired students.

33. Aural/Oral and aural/oral-cued speech students in FCPS feed into Poe Intermediate School and Annandale High School, which are both center-based schools. Aural/oral students who are not cued speech students are allowed to attend their home-based

school, upon request, and are provided itinerant special education support services. However, FCPS does not afford the same opportunity to the aural/oral-cued speech students, because it does not wish to provide the students with individual cued speech interpreters in their home-based schools, regardless of their individual needs and academic ability,

34. Dr. Donald McGee, the coordinator for FCPS hearing impaired programs, testified that if Michael were the only cued speech student, he would permit Michael to attend his neighborhood school and would provide individual interpretor services for Michael. Dr. McGee also stated that it was possible to provide itinerant special education services for Michael at his neighborhood school. However, he stated that there is an unwritten policy in the FCPS that the profoundly deaf must go to a center-based school and that FCPS would not permit all cued speech students to attend their neighborhood schools with individual interpretor services. He also stated that FCPS could not allow Michael to attend his neighborhood school for fear that other cued speech students would also request similar services. Michael's peers are hearing children and he does not feel the need to be with other hearing-impaired children for security reasons or otherwise.

35. At present there are only three high school students using cued speech in FCPS. All three cued speech high school students attend Annandale High School. Two of the three (Michael is one) do not reside in the neighborhood of Annandale High school, but are compelled to attend there because of the FCPS policy applicable to cued speech students. However, there are approximately 175 students in the aural/oral program who are attending their neighborhood schools and receiving itinerant special education services, including resource teachers and speech and language clinicians.

36. Of the three children currently using cued speech at Annandale High School, one is in the 10th grade and two (Michael Barnett and one other boy) are in the 9th grade. It is particularly noteworthy that there are three cued speech interpreters assigned to Annandale High School to cue for the three children. If Michael attends West Springfield High School,

it would not create a need for an additional interpreter. The two 9th grade students, Michael and John, have two classes together, earth science and physical education, and only earth science requires that they share an interpreter.

37. No other child currently using cued speech in FCPS is expected to enter high school until 1992 and beyond. Michael will have graduated before any of the elementary school-age students who are currently in grades K-4 reach high school. Consequently, no additional cued speech interpreters will be needed at the high school level until at least 1992.

38. Not all hearing-impaired, cued speech children desire or are capable of attending their neighborhood schools, thereby minimizing the necessity of cued speech interpreters for students who are other than center-based.

39. Cued speech interpreters, like resource teachers and speech and language clinicians, offer a special education service which can be provided, as with other such services, on an itinerant basis. FCPS currently spends approximately $13,000.00 per year in transportation costs for Michael, which exceeds the cost of an interpreter that could be provided on an itinerant basis for four to five hours per day at a cost of approximately $8,344.00 to $10,431.00 per year.

40. If FCPS can show that there is an additional cost over and above the cost of the bus transportation to transport Michael from his home to Annandale High School, then the Barnetts are willing to pay for that additional cost. Mrs. Barnett is also willing to serve as a cued speech interpreter for Michael at West Springfield High School, at no cost to FCPS, in order to facilitate his attending that school even though she would prefer not to serve as the exclusive cued speech interpreter for Michael.

41. On April 27, 1987, Michael's parents wrote to Dr. Donald McGee while Michael was attending the 8th grade in Poe Intermediate School. The parents requested that the restriction of busing him to a non-neighborhood school be removed and that he be allowed to attend West Springfield High School beginning in September 1987. Michael's parents stated that Michael had reached a level in the education process at which he was mainstreamed in a regular classroom environment, that with the

aid of a cued speech interpreter he had demonstrated that he could perform on a level with his hearing peers, that he was currently bused to junior high school outside of his own neighborhood school district, and that his performance had demonstrated that segregation in a school other than his own neighborhood school was no longer necessary. They further stated that removal of the restriction and allowing Michael to attend his neighborhood high school would facilitate his functioning in the least restrictive environment where he could attend school with his neighborhood peers, participate in school activities after school without additional busing time restrictions, be given a fair opportunity to participate in high school sports with coaches and friends with whom he had been involved in his neighborhood sports programs, become involved with his neighborhood friends in group school projects that require work in the evening and weekends, ride a local school bus to his neighborhood school, and participate in local school and social activities with neighborhood friends with whom he shares daily interests. The Barnetts stated that to remove the restriction and allow Michael to go to his neighborhood school would greatly reduce the barriers of isolation that presently restrict Michael from functioning in a normal and healthy environment. They requested that the necessary special education services of cued speech interpreting, itinerant resource, speech therapy and audiological services be provided to Michael at West Springfield High School.

42. On May 29, 1987, Dr. McGee replied to the Barnett's letter and informed them that the program closest to Michael's home which can provide the services indicated in his IEP is the program at Annandale High School.

43. On June 16, 1987, the Barnetts wrote to Dr. Beatrice Cameron, Assistant Superintendent for Student services and Special Education, FCPS, and noted that one of their long range goals for Michael was to reach a point academically where he would be able to attend his neighborhood school, similar to other hearing-impaired children in the aural/oral program. Their letter to Dr. Cameron stated that the services that Michael requires can be administered at his home-based school and that Dr. McGee's

letter did not address Michael's individual needs. They further stated that Michael was at a stage in the educational process where he could benefit most by being placed in his neighborhood school and that this would provide him with the least restrictive environment to develop socially and academically in his crucial formative years. They reminded Dr. Cameron that Michael has demonstrated for several years that with the supplemental aid of cued speech he has functioned in a satisfactory manner in a regular classroom environment and therefore should be educated, utilizing the aid of cued speech, in the school he would attend if not handicapped. They emphasized that they expected the FCPS to provide the following supplementary aids and services to satisfy the requirements of Michael's IEP: cued speech interpreter, itinerant resource support, speech therapy, and audiological services.

44. On July 14, 1987, Dr. Cameron replied to the Barnett's letter, noting that Michael's IEP recommended his continued placement in the cued speech program. She went on to state that West Springfield High School was not one of the high schools at which cued speech interpreting services were offered, but that they were available for Michael at Annandale High School and that transportation would be provided for Michael to Annandale for the school day and thereafter for extracurricular activities there or at West Springfield High School, as the Barnetts chose. Dr. Cameron also stated that "Fairfax County Public Schools is committed to the provision of individualized programs of special education and related services to over 15,000 students at over 170 facilities." She expressed her appreciation for the Barnett's supportive comments about previous services offered to their son and assured them that the school division would continue to offer the educational program "appropriate for him."

45. The Barnetts appealed the decision of Dr. Cameron, and on August 19, 1987, an FCPS Administrative Review Committee determined that Michael should continue his participation in the special education program for hearing-impaired students, which includes speech and language therapy, academic resource support from a teacher of the hearing-impaired, and cued speech interpreters.

46. The Barnetts were informed of the decision of the Administrative Review Committee on September 3, 1987, in a letter from Judith Singleton, Coordinator, Due Process, FCPS, Department of Student Services and Special Education. In her letter, Ms. Singleton also informed the Barnetts of their right to appeal this decision and of certain due process rights, including an impartial due process hearing conducted by an independent hearing officer appointed from a list maintained by the State Education Agency.

47. On September 15, 1987, the Barnetts informed Ms. Singleton by letter that they were appealing the decision refusing to provide special education services for Michael at his neighborhood school, and they requested an impartial due process hearing.

48. In his capacity as their legal counsel in this matter, Mr. Lenahan has spent approximately 92.10 hours on behalf of Michael and his parents. He has charged the Barnetts $110.00 per hour, which is comparable to reasonable community legal rates and does not include routine office overhead. In addition, the Barnetts have paid Lenahan & Volpe, P.C. for the costs of photocopying and postage in the amount of $193.08, and they have paid the sum of $1,500.00 to Dr. Terry Edelstein for her expert services as an educational diagnostician and psychologist, including her evaluation of Michael, review of Michael's school records, preparation of a psycho-educational report concerning Michael, preparation for, and her expert testimony at, the hearing on December 14, 1987. They have also paid for the expenses of Mrs. Elsie Daisey's travel to the site of the hearing from her home in North Carolina, which were $299.05 for airfare, rental car, mileage and parking, and an honorarium of $200.00 for the Cued Speech Center in lieu of paying her a fee for her expert testimony on the subject of cued speech.

Based upon the foregoing findings of fact, the hearing officer makes the following:

CONCLUSIONS OF LAW

1. The hearing officer has jurisdiction in this matter pursuant to § 22.1-214B of the Code of Virginia, and §§ 300.501-300.512, pp. 43-65, of the Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia. The law requires that all handicapped persons from ages 2 to 21, inclusive, residing in the Commonwealth of Virginia be identified, evaluated and have available a free and appropriate public education in the least restrictive environment so that to the maximum extent appropriate a child is educated with children who are not handicapped. The law also requires that the local school district ensure the parents' participation in educational placement decisions for their children. See, 20 U.S.C. § 1415; 34 C.F.R. § 300.345 and §§ 300.550-.552; Code of Virginia § 22.214; Virginia Regulations § 300.4, p. 28, §§ 300.344-300.345, pp. 35-36.

2. The term "free appropriate public education" means special education and related services which (1) are provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the Board of Education; (3) include preschool, elementary, secondary and vocational education; (4) make available physical education services; (5) are provided in conformity with an IEP; and (6) are provided in the least restrictive environment. Virginia Regulations § 300.4 and § 300.307, p. 28.

3. "Each state educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area serviced by the public agency." 34 C.F.R. § 300, 301.

4. Each local school division shall ensure that a continuum of alternative placements is available to meet the needs of handicapped children who need special education and related services. No single model for the delivery of services to any specific population or category of handicapped children will be

acceptable for meeting the requirement for a continuum of alternative placements (e.g., resource classes as the only option for children who need a self-contained placement or a separate facility as the only alternative placement for handicapped students). All placement decisions must be based on the individual needs of each child, and therefore, categorical placements of handicapped children are not permitted. Any placement may be considered categorical if no other placement option exists for that child. Local school districts shall document fully all alternatives considered and the rationale for choosing the selected placement. Virginia Regulations, § 300.551, pp. 28-29.

5. In order to determine the least-restrictive environment, each local school district shall establish and implement procedures which satisfy requirements as follows: (a) to the maximum extent appropriate, handicapped children, including those in public or private institutions or other care facilities, are educated with children who are not handicapped; and (b) special class placement, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Virginia Regulations §§ 300.550, pp. 30-31.

6. In interpreting evaluation data, eligibility, and placement decisions, each local school district shall: (a) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (b) ensure that information obtained from all of these sources is documented and carefully considered; (c) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (d) ensure that the placement decision is made in conformity with the least restrictive environment. Virginia Regulations § 300.533, pp. 31-32.

7. Each handicapped child's educational placement: (a) is determined at least annually; (b) is based on his/her IEP; and (c)

is as close as possible to the child's home. Virginia Regulations § 300.552, pp. 41-42.

8. Unless a handicapped child's IEP requires some other arrangement, the child is educated in the school which he/she would attend if not handicapped. Virginia Regulations § 300.552, p.42.

9. In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he/she needs. Virginia Regulations § 300.552, p. 42.

10. The placement decision shall include consideration of the child's social and personal needs derived from the child's socio-cultural assessment, as well as the child's level of educational functioning. Virginia Regulations § 300-552, pp. 42-43.

11. P.L. No. 94-142 makes the presumption that, "to the maximum extent appropriate, handicapped children in public and private institutions or other care facilities are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." Thus, the burden of proof is on those who would segregate students with disabilities.

12. The law permits the award of reasonable attorney's fees and costs under specified circumstances to parents of a handicapped child who prevail in an administrative proceeding such as this one brought under 20 U.S.C. § 1415. 20 U.S.C. § 1415(e)(4).

13. Michael is most appropriately suited for that which he perceives as "full mainstreaming," i.e., matriculation in his neighborhood secondary school. He requires technical assistance in the provision of a cued speech interpreter and resource teacher support at the beginning of this transition. Michael possesses the intellectual and personality dynamics to be separated from the resource program at some future time. In fact, Michael's desire to be a fully participating community member is the expected and the desired outcome of a cued speech program.

14. To benefit from any program of education developed for him, Michael currently requires the special services of a cued speech interpreter in academic courses, a resource teacher, and a speech and language clinician trained to work with the hearing-impaired.

15. Speech therapy can be provided on an itinerant basis to Michael in West Springfield High School, his neighborhood school. His resource class can also be provided itinerantly at his neighborhood school, as well as cued speech interpretive support services. The FCPS has established a de facto policy, however, that cued speech interpretive support services must be provided in a center-based school, Annandale High School, for all Fairfax County high school students who use cued speech. This policy clearly violates the law that prohibits the establishment of a single model for the delivery of services to any category of handicapped children.

16. Michael's progress and demonstrated academic, social and athletic achievements require FCPS to provide him with special education services based an his individualized needs, rather than labeling him and restricting his opportunity for a free appropriate public education to a school other than his neighborhood school. West Springfield High School is the least restrictive environment and is where Michael would attend school if he were not handicapped.

17. Michael's attendance at his neighborhood school would be a normal preparation and foundation for him to build upon in preparing for college with his hearing peers. Michael's self-confidence and esteem will be nurtured and grow if he is allowed to compete and achieve academic success in the same environment in which his neighborhood friends are attending school. FCPS has rejected the offers of the Barnetts to make arrangements for providing individual cued speech interpretive services for Michael at his neighborhood school.

18. Special transportation services now being provided to Michael could be eliminated and the cost of special education for Michael would be substantially reduced if he were permitted to attend his neighborhood school.

19. Michael is well prepared and suited educationally, emotionally, and socially to attend his neighborhood school along with his neighborhood, hearing peers.

20. Michael feels isolated and discriminated against by virtue of the refusal of FCPS to change his placement from the center-based school to which he is transported along with other hearing-impaired students, to his neighborhood school attended by his neighborhood peers. If his aspirations to attend his neighborhood school are not fulfilled, there is a possibility it could adversely affect his motivation and therefore his record of scholastic achievements.

21. Michael is a model for the cued speech program and even the FCPS hearing-impaired program specialist acknowledges that Michael is capable and worthy of attending his neighborhood school.

22. FCPS led Michael and his parents to believe that when Michael reached high school age, if he was prepared academically and otherwise, he would be placed in his neighborhood school. The individual needs of Michael are not being met by the refusal of FCPS to change his placement to his neighborhood school.

23. The least restrictive environment for Michael is his neighborhood school, West Springfield High School, which is closest to his home and is the school he would be attending if he were not handicapped.

24. Michael still requires, and FCPS is legally obligated to provide in order to meet his individual needs, special education services including a cued speech interpreter in academic courses, resource teacher, speech and language clinician, and audiological services at his neighborhood school.

25. FCPS has not sustained its burden of proof that a free, appropriate public education for Michael has been met by placement of Michael in Annandale High School, a center-based school, along with the other high school age students in the cued speech program.

26. Michael is being discriminated against and is being denied his legal rights to a free, appropriate public education which meet his individualized needs in the least restrictive

environment. FCPS has not complied with the Federal and State laws which provide that no single model for the delivery of services to any specific population or category of handicapped children will be acceptable for meeting the requirement for a continuum of alternative placements. FCPS has not based its decision on the individual needs of Michael and instead has categorically placed him along with other handicapped children in the cued speech program in a school other than the neighborhood school which he would attend if he were not handicapped.

27. FCPS's policy that the profoundly deaf students using cued speech must go to a center-based school is violative of Federal and State laws. Such a policy clearly violates, *inter alia*, the legal requirements that FCPS provide Michael with a free and appropriate public education in the least restrictive environment, and that FCPS meet the individual needs of Michael, and certainly violates the legal prohibition against the establishment of a single model for the delivery of services to any specific population or category of handicapped children.

28. The provision of a cued speech interpreter for Michael at his neighborhood school is no different than the provision of other itinerant special education services such as resource teachers, speech and language clinicians, audiological services, which are now provided in neighborhood schools to other students in the aural/oral program for the hearing-impaired in FCPS.

29. The Virginia law states that in determining placement as close as possible to the child's home and in selecting a least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he/she needs. In Michael's case, he has expressed his intense desire to attend his neighborhood school, and upon being denied that request his great frustration at being isolated from those who are his neighborhood friends and peers.

30. Michael's patience, understanding, motivation, and hard work is being ignored by FCPS, by placement against his will in a school other than his neighborhood school. This is not in his best interest and unpredictable harmful effects could result.

31. FCPS has failed to consider Michael's social and personal needs, derived from a socio-cultural assessment, as well as his level of functioning. Instead, FCPS has arbitrarily and capriciously established a policy that all persons in the aural/oral-cued speech program who are high school age students will be educated at a center-based school, Annandale High School. This is a violation of Federal and State law.

32. Based on the independent socio-cultural assessment conducted by the Barnett's expert, Dr. Terry Edelstein, Michael is most appropriately suited for mainstreaming in his neighborhood secondary school and that placement is appropriate for Michael as he prepares for independent functioning in college, as well as the economic and social mainstream of life. To deny Michael such a placement is to deprive him of a free appropriate public education.

33. Michael is a student whose needs must be viewed on an individual basis in formulating a special education program to provide him with a free appropriate public education. Each child's needs are different, and therefore FCPS need not fear that there will be some immutable precedent established as a result of the decision in this case to place Michael in his neighborhood school with special education services, including a cued speech interpreter. Each student must be considered individually in determining his or her placement. Some hearing-impaired students prefer to attend school with their hearing-impaired peers and therefore will not request placement in their neighborhood school. For other students it may not be appropriate to send them to their neighborhood school because academically and socially they are better suited to attend a center-based school. There simply is no single profile for the hearing-impaired students anymore than there is for the hearing students.

34. Michael's best interests call for him to be assimilated into a normal neighborhood school environment, with the provision of the special education services called for in his IEP. Moreover, the benefits to be derived from attending his neighborhood school, educationally, socially, and personally, far outweigh any interest that Michael may have in the minimal

contact which his resource teacher has had with his regular classroom teachers to date at Annandale High School.

35. Any concern that FCPS may have in regard to the cost of placing Michael in his neighborhood school is neither lawful or justified. Nothing in Federal or State law governing education of the handicapped permits consideration of the cost in providing a free and appropriate public education in the least restrictive environment and federal courts have so held. Furthermore, the "fact of the matter is that there is no evidence that integrated programs cost more than segregated ones. Of course, good programs in any setting cost money. For students with intensive needs, educational programs will cost more than those for regular education students. However, people think that integrated program will cost less in the long run than segregated ones." "People have justified large segregated programs (e.g., regional educational centers) on the grounds that they will produce 'economies of scale' (i.e., larger is cheaper). Yet this cost saving has not been demonstrated. Large segregated programs tend to be accompanied by:

1. excessive transportation costs for students dispersed over a large geographical area;
2. duplication of administrative and support staff . . .;
3. the need to maintain separate record-keeping systems;
4. duplication of equipment and facilities.

Thus, one cannot make the case that larger is cheaper. "Purposeful Integration . . . Inherently Equal, a manual prepared by the Center on Human Policy, Syracuse University, for the Technical Assistance for Parents (TAPP) Programs (funded by the Office of Spec. Ed., U.S. Dept. of Ed.), 1987, at pp. 38-39. In Michael's case, the cost of his transportation is greater than the cost of a cued speech interpreter.

36. If "integration" and a "free and appropriate public education in the least restrictive environment" mean anything at all it is that a handicapped student has the lawful right to be educated according to his or her individual needs in a place and in a manner the same as other students who are not handicapped.

37. Any form of segregation is abhorrent to the human spirit. "The best way to teach democracy is to practice it. A central principle behind democracy is that all people shall have the same opportunities. In education, this principle means black and white and male and female students, students with and without disabilities going to school together. Through school integration, students with and without disabilities learn to live together in society as adults." Purposeful Integration. . . Inherently Equal; *supra* at p. 17.

38. "One of the problems many children with disabilities have always faced is making friends in their own neighborhoods. It may be a bit idealistic to expect that strong and lasting friendships between disabled and non-disabled students will always spring up simply because they attend the same school. Yet, such friendships cannot develop if children do not have opportunities to be with each other." Purposeful Integration . . . Inherently Equal, *supra* at p. 17.

39. There is legal precedent for the placement of students whose individual needs require that they be placed in their neighborhood school with special education services. One such case is *In re Dana Odon v. Dixie District, Marion County Special Education Consortium*, Case No. SE82-348, in the State of California. This case arose before the State Superintendent of Public Instruction, State of California, and in a due process hearing like this one involving Michael Barnett, a hearing officer confronted with the question of an appropriate placement for the petitioner, Dana Odon, a child with a profound bilateral hearing loss whose overall educational and social development was akin to that of Michael's, concluded that the State was required to provide a sign language interpreter in her regular classes in order for her to benefit from her education. The hearing officer in *Odon* distinguished the Supreme Court decision in *Board of Education, et al. v. Rowley*, 102 S.Ct. 3034 (1982) on the grounds that in *Rowley* the child did not need the services of a sign language interpreter in all of her academic classes because she was an excellent lipreader. The hearing officer concluded that the school district's placement offer of the California School for the Deaf was an inappropriate placement. Instead, he found

that "evidence established that petitioner's educational needs can be met in regular classes with a sign language interpreter in addition to 45 minutes a day of special education instruction and speech and language therapy." He concluded that removal of the petitioner from a regular educational environment to the more restrictive environment of the California School for the Deaf was not necessary to provide her with a free appropriate education and would be inappropriate. The hearing officer went on to note that interaction and communication with peers is an important aspect of the child's educational experience. The hearing officer likewise noted that the handicapped child's educational placement is to be as close as possible to the child's home and that the appropriate placement for the petitioner was her neighborhood school which could provide her with a free appropriate public education in the least restrictive environment. (A copy of the *Odon* decision is attached hereto as an exhibit.)

40. In another case, *In The Matter Of Sinead Clements*, in the State of Minnesota, an Administrative Law Judge concluded that a student required the special services of a cued speech interpreter, a teacher of the hearing-impaired, and a speech therapist trained to work with the hearing-impaired, and that the school district had failed to show by a preponderance of the evidence that its proposed change in the student's placement from the pre-school program at a Montessori school to its program for school-aged hearing-impaired children at a public elementary school was justified. In that case, the student was not ready for a public education and therefore the Administrative Law Judge concluded that it was appropriate for her to be educated at a private school closest to her home, with the school district providing special education services including the services of a cued speech interpreter. In addition, the Administrative Law Judge also found that the parents were entitled to receive reimbursement for their legal expenses and related costs. (A copy of the *Clements* decision is attached hereto as Exhibit 2.)

41. In the case of *Department of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir.1983), *cert.denied*, 470 U.S. 1117 (1985), the Court of Appeals held that a State Department of Education Home Treatment Program did not

satisfy the concept of the least restrictive environment prescribed by the Federal Regulations, that Katherine was fully capable of participating in regular classes with non-handicapped children, and that special medical services could have been made available in a public school setting without unduly burdening the school system. Accordingly, the Court held that the DOE plan for Katherine did not offer her a free appropriate public education within the meaning of the Education for All Handicapped Children Act. (A copy of the *Katherine D.* decision is attached hereto as Exhibit 3.)

42. There was no written offer of settlement made by FCPS at any time prior to hearing of this matter.

43. The parents have not unreasonably protracted the final resolution of this controversy. Indeed, the FCPS by virtue of some fault or defect in their electronic recording equipment has failed to preserve a verbatim record and delayed the final resolution of this case.

44. The rate of $110.00 per hour is reasonable for the legal services provided to Michael and his parents in this matter.

45. The time spent and legal services furnished by Mr. Lenahan are not excessive considering the nature of this matter.

46. The amount which the parents have paid their expert witnesses, Dr. Terry Edelstein and Mrs. Elsie Daisey, is reasonable for the expert services rendered.

47. The parents have incurred legal expenses and related costs in the amount of $12,323.13 and are entitled to reimbursement for them.

Based on the foregoing, the hearing officer provides the following:

RATIONALE AND DECISION

Accordingly I find from the facts and conclusions based upon the numerous documents and exhibits, tapes and submissions of counsel and the law and regulations that this child has been afforded a free and appropriate public education by the excellent hearing impaired program developed within the Fairfax County Public Schools (FCPS) but without adequate consideration of

placement in the least restrictive environment by a broad group of persons sufficiently knowledgeable about the child to develop an IEP which is based upon all available information including data, some of which was not considered as it was not available but is collected herein, sufficient to justify separately educating this particular child in his unique circumstances and his obvious needs clearly differing from others suffering his special disability at this critical time in his life.

He cannot be educated away from his neighborhood school for the sole reason that "West Springfield High School is not one of the high schools at which cued speech interpreting services are offered." Letter to Parents from Assistant Superintendent Cameron July 14, 1987, submitted as an exhibit by both parties.

Virginia regulations allow special class placement in separate schooling from the "regular educational environment only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" (300.550, p.30 (b)). I find no authority that "achieved satisfactorily" means that if it costs too much that education in the school that would be attended absent the handicap can be denied in a proper case such as this one.

It is clear that the Parents here have requested a less restrictive environment (integration) as their child enters the grades 10-12 and by their letters of April 27, 1987, June 16, 1987, and July 24, 1987, without so stating, requested a reevaluation of their child. There was an administrative review conducted on August 19, 1987 without benefit of a reevaluation such as has been conducted by the Parents since Michael was required to remain at Annandale High for the 9th grade. Since no discussion is evident in this record of those matters required to be considered to justify the child's education, I find that FCPS (the LEA) denied the Parents, under Federal Regulation 300.534, and identical State Regulations, recently interpreted in Q. 88-021, State Superintendent's Memo No. 109, May 25, 1988, a reevaluation and failed to consider those matters contained in the 1981 Program Guidelines for Students with Hearing Impairments in Virginia Public Schools, i.e. the 7 criteria on page 38 and discussion following to determine readiness to function

academically in a general education setting. See Page 41, use of a "notetaker," and Page 42, placement Option C "Regular class".

In the above referenced Guidelines, Appendix "D", it is recognized that "appropriate" means that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.

It is interesting that a witness in this case, Dr. Donald McGee, who called Michael Barnett a real success story, or words to that effect, was a contributor to the Guidelines.

Before going further, I have discovered that in its Clarification of Issues publication of 1982, the Virginia Department of Education requires that the eligibility committee initially must be certain the information obtained on the student can substantiate the need for a student's removal from general education in order to ensure that careful attention is given to the least restrictive (LRE) requirement. Similarly, I would apply this reasoning to retaining the child in the more restrictive environment where he has reached the obvious potential to function in general education at the school he would normally attend with his non-hearing impaired peers.

Of particular importance are pages 25 and 26 of this document stating that removal from the general education environment constitutes a denial of the right to a free and appropriate public education (FAPE) in the LRE *unless* it can be clearly documented that such removal is the only way that the student's needs can be met. (Emphasis added.) I find nothing in this record that supports the proposition that the LEA in this case is aware of the answer on page 25 as to what factors must be considered in determining the LRE for an individual student, to-wit: *"Primarily, the unique and individual needs of the student determine the basis on which decisions regarding the LRE are made,"* and on page 26 the other factors are 1) placement in the school he would normally attend if not handicapped; 2) education in regular classes, with use of supplementary aids and services; 3) the quality and intensity of services which the handicapped student require; 4) any potential harmful effects which might result from a particular educational environment;

and 5) the amount of time required and the distance a student must be transported to and from his home.

Finally, on LRE, in answer to the argument regarding expenditure of funds proposed in his argument by the well prepared, learned counsel for the LEA, we find on page 26 of the Clarification of Issues document the following from the Virginia Department of Education:

> Q. "Can the availability of personne, professional travel time, and economic factors be considered in determining
> the LRE?
> A. No. Only the needs of the student can be considered."

Such being the criteria, we proceed to the argument that if it is determined that Michael Barnett's proper placement is at West Springfield based as it must be upon his and his only unique situation, needs, and circumstances, the LEA would have to treat all other hearing impaired in similar fashion. Fortunately, this determination relates only to Michael W. Barnett. No other case in Virginia is the same, certainly none reported in the cases or hearing summaries available or cited to me.

Judge Turk, in 1981, in *Pinkerton v. Moye*, cited by the LEA, decided properly that an LEA was not required to provide a separate system of special education for a 5th grade, 12 year old suffering from learning disabilities determined to be in need of a "self-contained" program. The parent complained only that her child's placement would preclude maximization of her educational capabilities due to the child's emotional attachment to her present school. The Court found that placement in the existing "self-contained" program was a reasonable accommodation by the LEA, therefore the Court did not require placement in the school the child would attend if not handicapped as the "self-contained" program was but 6 miles further than the school attended when the need for the program existing at another school was discovered. The Court also found that the child's emotional needs could be met at the program school if she were encouraged in the transition by her mother and her psychologist. As I have found and concluded herein, there will

be little or no cost involved in mainstreaming Michael W. Barnett into his neighborhood school, I do not suggest or order that the establishment for him at West Springfield High School of a new, comprehensive, integrated cued speech program as suggested by the LEA, by counsel, will be necessary.

Accordingly, for the foregoing reasons, I find placement of Michael W. Barnett in West Springfield High School to be appropriate.

Although I am aware and have found that some states allow hearing officers to order reimbursement of attorneys fees, in Virginia such authority does not exist; however, I am aware that pending in the 4th Circuit Court of Appeals is the North Carolina decision of Judge Bullock, EHLR dec. 558:179 (M.D.N.C.), 650 F.Supp. 1427, holding that North Carolina's refusal to allow hearing officers to order reimbursement is contrary to 20 U.S.C. 1415, and is included therein. In the event of an appeal to a Court, my findings herein are that the attorney's fees are customary in this area and are reasonable as are the other expenses.

As I have found, the parents were entitled to an Independent Educational Re-Evaluation under 34 C.F.R. 300.534, .503, and identical State Regulations plus the May 25, 1988 State Superintendent of Education Memo No. 109 requiring re-evaluation when a significant change in placement is being considered, I will order FCPS to reimburse to the parents, upon proof of such payment, the amounts paid to Dr. Terry Edelstein for her IEE filed herein and appearance at the hearing on December 14, 1987.

DECISION

1. The FCPS shall convene prior to the 1988-89 academic year an IEP meeting to provide for placement of MICHAEL W. BARNETT in the 10th grade at West Springfield High School, using this record with Dr. Edelstein's IEE as a basis for providing all services needed, including the offers of the parents to pay for necessary additional transportation costs and to provide cued speech interpretation at no cost if the 3rd cued speech

interpreter at Annandale is required to teach the 2 remaining cued speech hearing impaired children at that school.

2. The FCPS shall reimburse to the parents of Michael W. Barnett such amounts as have been paid to Dr. Terry Edelstein for her written IEE of November 11, 13 and 19, 1987 and hearing appearance on December 14, 1987, and

IT IS SO ORDERED.

Entered this 16th day of June, 1988.

/s/ F. C. Bagley
FLOYD C. BAGLEY
Duly Qualified
Special Education Hearing Officer

APPEAL RIGHTS

Pursuant to § 300.509-512 a decision made by the hearing officer is final unless a party to the hearing appeals to the State for an administrative review. An appeal by either party must be instituted within 30 administrative working days of the date of the hearing decision.

APPENDIX G

OPINION AND ORDER OF THE STATE LEVEL REVIEWER

August 4,1988

VIRGINIA DEPARTMENT OF EDUCATION

STATE LEVEL REVIEW

Fairfax County Public Schools School Division	Mr. and Mrs. James E. Barnett Parents
Dr. Robert S. Spillane Division Superintendent	Michael Barnett Child
John Cafferky, Esquire Counsel for School Division	John C. Lenahan, Esquire Counsel for Parents
Frank D. Hargrove, Jr., Esq. State Level Review Officer	Fairfax County School Board Hearing Initiated By

STATEMENT OF THE CASE AND ISSUE

This is a state level review of the decision of local hearing officer Floyd C. Bagley, which was rendered on June 16, 1988. The hearing officer granted the request of James and Cynthia Barnett, parents of Michael Barnett, that the Fairfax County School Board ("school system") educate their hearing impaired son at West Springfield High School ("West Springfield") during the 1988-89 academic year. In addition the hearing officer ordered the school system to use Dr. Terry Edelstein's report as a basis for providing all services needed. The hearing officer also ordered the school system to reimburse the Barnett's for the fees they paid Dr. Edelstein.

By so ruling, the hearing officer rejected the school system's contention that it had proposed a free appropriate public education for Michael at Annandale High School ("Annandale").

The central issue in this review can be framed as follows: Does the school system's proposal to educate Michael in the integrated cued speech program at Annandale meet its obligation to provide a free appropriate public education in the least restrictive environment?

PROCEDURAL MATTERS

By conference call held on July 14, 1988, the school system asked for leave to present additional evidence to supplement the record of the due process proceeding. Specifically, the school system asked that it be allowed to call as witnesses Dr. Donald McGee, Fairfax Public School's Program Specialist, Hearing Impaired Program, and Ms. Valerie Lewis, Fairfax County Public School's Speech and Language Therapist. Both McGee and Lewis had testified at the hearing below.

Unfortunately, the record of the testimony given before the hearing officer is unavailable due to a malfunction in the recorder used to tape the hearing.

The Barnetts' counsel objected to holding another hearing at the administrative review level arguing that the witnesses'

expected testimony was not "necessary" as defined by the Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia (Virginia Regulations).

In my opinion an informed decision could not be made without my hearing the testimony of the material witnesses. As a result I agreed to allow the school system and the parents to call witnesses to supplement the record in this matter.

After I ruled I would hear additional evidence, counsel for the parents requested leave to call Dr. Terry Edelstein and James and Cynthia Barnett to testify.

The hearing was held at the Belle Willard Administrative Center in Fairfax, Virginia, on Wednesday, July 30,1988.

Prior to the hearing the following stipulated exhibits were received:

1. Stipulated Exhibit No. 1: Testimony of Kate Tobin;
2. Stipulated Exhibit No. 2: Testimony of Stuart Layman

(Stipulated Exhibit No. 2 was supplemented by an oral statement made on the record by counsel for the school system. This statement was stipulated to by counsel for the Barnetts).

3. Stipulated Exhibit No. 3: Stipulation of Facts.

In addition, the following exhibit was offered on behalf of Michael Barnett:

1. Barnett Exhibit No. 1: Report card for period ending 6/20/88.

The Barnetts also sought to introduce a written report entitled Supplement to Psycho-Educational Evaluation which was prepared by Dr. Terry Edelstein. The school system objected to the introduction of the report because it had not been disclosed prior to the hearing. This objection was sustained as the report was not provided within five working days of the hearing. It should be noted that counsel for the school system did not object to Dr. Edelstein reading her supplemental report into the record, so the ruling keeping the written report out of evidence has little practical effect.

At the conclusion of the testimony of the witnesses on July 30,1988, counsel for the school system and the Barnetts were

given until August 1, to file simultaneous briefs supporting their positions.

FINDINGS OF FACT

By Stipulated Exhibit No. 3 the school system and the Barnetts stipulated to certain of Mr. Bagley's findings as set out in his post hearing report. The stipulated findings are incorporated herein by reference. In addition, I make the following findings of fact:

1. Michael's primary handicapping condition is "hearing impaired".

2. Paragraph 28 of Mr. Bagley's Findings of Fact is adopted and incorporated herein by reference.

3. There are in excess of three hundred hearing impaired students in the school system. Three different methodologies are offered for teaching hearing impaired students, total communication, cued speech and auditory/oral.

4. The school system cued speech program is a comprehensive, integrated program which runs from preschool through high school. According to their individual abilities and needs, many students attend regular academic classes, aided by trained cued speech interpreters. However, interpreting services are only one component of the cued speech program. In addition, the hearing-impaired students receive speech and language therapy from a trained speech therapist. A third important component is resource assistance: a trained teacher of the hearing impaired provides support on a daily basis, and assists in dealing with the special problems of hearing impaired students. The program is overseen by the administrative staff which hires and schedules interpreters, arranges for coverage of absent interpreters, and monitors and supervises the resource teachers, speech therapist, interpreters, and other program personnel.

5. The school system has established centralized locations for the cued speech program at a pyramid of schools which constitute a feeder network. Beech Tree Elementary and Poe Intermediate, which Michael attended, are the elementary and intermediate sites

for that program. At the high school level, the cued speech program has been established at Annandale.

6. Michael completed the ninth grade at Annandale in June, 1988, and received the following grades: Earth Science (B+); Algebra I (A); HPE 9 Boy (A); World Geography (A); Hearing (P); and English 9 (C+).

DECISION AND RATIONAL

I believe the educational program proposed for Michael by the school system constitutes a free appropriate public education in the least restrictive environment.

My decision reverses the holding of the hearing officer. An analysis of the school system's proposed educational plan in light of the applicable statutory law, regulations and case law will demonstrate the basis for my decision.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982) the United States Supreme Court stated a free appropriate public education is one that

> "[C]onsists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act."

The school system proposes for 1988-89, that Michael continue to participate in the cued speech program at Annandale. Under the program Michael would attend general education classes aided by a trained cued speech interpreter. In addition, he would receive speech and language therapy from a trained therapist and resource

assistance from a trained teacher of the hearing impaired. Resource assistance would be provided to Michael on a daily basis.

During the 1987-88 school year Michael participated in similar programming in the ninth grade at Annandale. He earned excellent grades and participated in interscholastic basketball and baseball. In addition he made friends and freely interacted with other students. Dr. Edelstein, the psychologist testifying on Michael's behalf at the hearing on July 30, stated that Michael had grown and matured over the past year. Michael's achievements over the past year are a culmination of a long process of preparing him to receive his academic instruction in the regular classroom setting. Beginning in the second grade he was placed in the cued speech component of the school system's hearing impaired program. He progressed and was increasingly mainstreamed over the years. For the past two years, he has received his academic course work in regular classrooms at Poe Intermediate School and Annandale.

In view of the fact Michael is achieving at a very high level in a regular classroom setting, despite his handicap, one cannot say he is not receiving sufficient educational benefit as described in *Rowley*. It follows that the program proposed by the school system constitutes a free appropriate public education.

Mr. and Mrs. Barnett do not have major objections to the services afforded by the cued speech program. They do, however, object to the fact the program is centralized at Annandale and is not offered at West Springfield, Michael's neighborhood school. They argue the school system should furnish Michael with a cued speech interpreter at West Springfield and allow him to use the services of itinerant speech therapists and resource teachers who already serve West Springfield.

The parents contend the school system's refusal to offer the cued speech program at any school but Annandale, constitutes a categorical placement that is forbidden by the state regulations governing special education (see Virginia Regulations, at pg. 29). The parents further assert this "categorical placement" fails to meet the federal and state requirements that Michael be educated in the least restricted environment which, in their view is the regular classroom setting at West Springfield. They also contend that there

is no reason why the services Michael needs cannot be satisfactorily provided at West Springfield. Finally, the Barnetts contend the cost of providing a cued speech interpreter to Michael at West Springfield would be less expensive to the school system than transporting Michael to Annandale. However, they take the position that cost and the availability of professional resources are not valid factors to be considered in deciding upon an appropriate placement determination. In support of this contention they rely upon a state Department of Education publication entitled "The Process for Special Education Determination in Virginia".

In the following paragraphs I will address the Barnetts' assertions.

I do not believe that because the school system has made cued speech available only at Annandale rather than West Springfield or any of the other high schools in Fairfax County, the school system has engaged in "categorical placement" in violation of the Virginia Regulations. Those regulations state that "no single model for the delivery of services to any specific population or category of handicapped children will be acceptable for meeting the requirement for a continuum of alternative placements".

Dr. Don McGee testified at the state level review hearing that the school system has a full continuum of potential placement alternatives for students described as deaf or hard of hearing. These placements run from less intensive itinerant services in a student's base school, to more intensive service in any of the three centralized public program options, to a state school for the deaf, and finally, to private day or residential school if necessary.

The cued speech method is only one of several methods available for educating hearing impaired students. Dr. McGee testified that Fairfax County is one of only five school districts in the nation which have available three different options for educating hearing impaired students. The choice of which program a hearing impaired student will participate in is left for the child and his parents. Dr. McGee stated that some students who are described as profoundly deaf like Michael, are appropriately served in their neighborhood schools with itinerant hearing resource and speech/language services. In short, the school system provides an array of available options for hearing impaired students. This fact

refutes any claim that the school system engages in impermissible categorical placement of hearing impaired students.

There are compelling administrative reasons for the school system to establish a center-based cued speech program. The school system must maximize its use of scarce human resources, particularly cued speech interpreters. In allocating interpreters, the school system must not only meet present needs, but must be prepared to deal with future situations, such as enrollment of new students desiring cued speech, departure of interpreters or resource teachers, and the progressing needs of other students in the cued speech program.

Dr. McGee testified that having all secondary level cued speech students and cued speech interpreters at the same high school building minimizes time lost on interpreter travel, allows an interpreter to serve more than one student and allows one interpreter to cover at least part of a class when another is absent. This is important because the school system has experienced a chronic shortage of cued speech interpreters. Dr. McGee stated he had made strenuous efforts to attract additional interpreters with little success. As a result, the school system is justified in concentrating its limited resources at Annandale to provide the cued speech program.

The Barnetts' contention that the school system cannot justify a center-based cued speech program by relying on economic considerations has been rejected by the courts. *Department of Education of Hawaii v. Katherine D*, 727 F.2d 809 (1983); *Pinkerton v. Moye*, 509 F.Supp. 107 (1981).

The *Pinkerton* court addressed a situation similar to the one faced here. In that case the parents of a learning disabled child and the school board of Patrick County agreed that the child should be placed in a "self-contained" class for learning disabled students. Because only six students in Patrick County had been identified as in need of a self-contained class, the school board established such a class in a single elementary school, basing its decision upon budgetary constraints as well as the school's central location. The child's parents argued that the school board had to offer a self-contained class in their child's neighborhood school.

The court rejected the parents' contentions, holding that the school board's offer of placement at the centralized, self-contained class was appropriate. In doing so, the Court examined the same regulations upon which the parents rely here. First, the court noted that 45 C.F.R. Sec. 121a.551(c) (now 34 C.F.R. Sec. 300.552(a)(3)) provides that the school district must insure that the child's placement is as close as possible to the child's home. The court interpreted that section, citing the regulatory comment, to mean that geographical proximity is but one factor to be considered in placing a child. 509 F.Supp. at 112. Second, the court cited the federal regulation which provides that: unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped. 45 C.F.R. Sec.121(a). 551 (now 34 C.F.R. Sec. 300.552(c)). In *Pinkerton*, the court held the child's IEP reasonably required the child to be educated in a center-based school. The court reasoned that:

> "It hardly needs to be stated that educational funding is not unlimited. It follows, therefore, that competing interests must be balanced to reach a reasonable accommodation. On the one hand are the undeniably important personal needs of the individual handicapped child, on the other, the realities of limited funding and the necessity of assisting in the education of all handicapped children . . . Excessive expenditures made to meet the needs of one handicapped child ultimately reduce the amount that can be spent to meet the needs of the other handicapped children.

509 F. Supp. at 112-113.

Thus, it is proper for the school system in the present case to consider whether extending its cued speech interpreters and other resources to serve a single student at his or her neighborhood school is a reasonable use of those resources. It also follows that where a child's IEP reasonably requires that he be educated in some school other than his neighborhood school, such a placement is permitted and may constitute the least restrictive environment.

It has also been recognized that a school system may consider when developing an educational plan not only the marginal increase in resources necessary to serve an individual student, but

the resources necessary to serve similarly situated students who would have the right to demand the same benefit. This position is supported by the decision in *Troutman v. School District of Greenville County*, EHLR Dec. 554:487 (D.S.C.1983). In *Troutman* the court observed that while an "Orientation and Mobility" specialist could travel to plaintiff's specific neighborhood school, he could not travel to each student's neighborhood school who might have a right to request his services if an exception were made for plaintiff. In the present case, Dr. McGee stated he did not believe the school system could feasibly provide services for all its center-based students in neighborhood schools. If an exception were made for Michael the school system would not be able to respond to similar requests from other students.

The parents rely on a state Department of Education document published in 1982 to support the proposition that the availability of personnel and economic factors cannot be considered in determining the appropriate placement for a handicapped child. While I, like counsel for the parents, can find no superintendent's memorandum revising the Department of Education's position, I do not believe the guidelines constitute controlling authority in this case. Clearly, the position adopted in the publication has been rejected by the courts in the cases cited above.

I recognize and the school system concedes that Michael strongly desires to be educated at West Springfield in order to affiliate with others in his immediate community. The fact is that Michael has expressed a desire to be educated in his base school as early as the fourth grade. Nevertheless, he has never allowed placement in another school to affect his motivation or performance. During the past year, while this matter was being considered at the due process hearing level, Michael successfully completed the eighth grade at Annandale. In short, Michael has shown the ability to cope with disappointment and to excel.

There is no convincing evidence that Michael will be harmed by returning to Annandale. Dr. Edelstein testified that Michael might experience "reduced levels of achievement" at Annandale during the 1988-89 school year. However, she did not suggest that Michael could not receive educational benefit or make educational progress next year at Annandale. I believe Michael will continue

to derive benefit from the program that has served him well in the past. While the benefits that Michael derives from the program at Annandale are proven, the same good results cannot necessarily be expected if the parents' wish were granted and Michael were allowed to attend West Springfield. Specifically the parents' proposal that resource and speech and language services be provided on an itinerant basis causes me concern that Michael would not have sufficient support to continue his strong academic achievement.

Personally, I might prefer that there were a way to educate Michael at the high school in his immediate locality. However, I do not believe that such a decision is permitted where Michael is already being provided a free appropriate public education in the least restrictive environment. Clearly Michael needs the services offered in the cued speech program. The school system, based on sound educational, economic and administrative considerations offers those services at Annandale. Attendance at Annandale has not kept Michael from associating with members of his community in a number of ways. Michael participates in local church youth activities, sporting events and impromptu get togethers with other children in his neighborhood. In addition, he has friends in his neighborhood. I do not believe that Michael has been cut off from his immediate neighborhood.

CONCLUSION

The Fairfax County Public Schools has proposed an educational program at Annandale that is a free appropriate public education in the least restrictive environment.

/s/ Frank D. Hargrove, Jr.
State Level Review Officer

CERTIFICATE

I certify that on the 4th day of August, 1988, a true copy of the attached opinion was sent to John C. Lenahan, Esquire, Lenahan & Volpe, 3975 University Drive, Fairfax, Virginia 22030, counsel for the appellees and John Cafferky, Esquire, Hunton & Williams, Post Office Box 1147, Fairfax, Virginia, 22030, counsel for the Fairfax County School Board.

/s/ Frank D. Hargrove, Jr.

APPENDIX H

ADDENDUM OF STATUTES AND REGULATIONS

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a):

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . .

Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2):

The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d, *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this title.

Section 305 of the Rehabilitation Act of 1973, 29 U.S.C. § 775(a):

(1) In order to provide a focal point in communities for the development and delivery of services designed primarily for handicapped persons, the Commissioner may make grants to any designated state unit to establish and operate comprehensive rehabilitation centers. The centers shall be established in order to provide a broad range of services to handicapped individuals, including information and referral services, counseling services, and job placement, health, educational, social, and recreational services, as well as to provide facilities for recreational activities.

(2) To the maximum extent practicable, such centers shall provide, upon request, to local governmental units and other public and private nonprofit entities located in the area such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this chapter, particularly the requirements of section 504 of this title.

Section 304 of the Rehabilitation Act of 1973, 29 U.S.C. § 774(d)(1):

For the purpose of training a sufficient number of interpreters to meet the communication needs of deaf individuals, the Secretary, through the Office of Information and Resources for the Handicapped, may award grants under this section to any public or private nonprofit agency or organization to establish interpreter training programs or to provide financial assistance for ongoing interpreter training programs. . . .

Section 315 of the Rehabilitation Act of 1973, 29 U.S.C. § 777e(a):

The Commissioner may make grants to designated state units to establish within each state a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals.

Regulations of the United States Department of Education for the Enforcement of Section 504, 34 C.F.R. Part 104 –

§ 104.4 Discrimination prohibited.

(a) ***General.*** No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under

any program or activity which receives or benefits from Federal financial assistance.

(b) ***Discriminatory actions prohibited.***

(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others; . . . .

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain

the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration

(i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,

(ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or

(iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections

(i) that have the effect of excluding handicapped persons from, denying than the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or

(ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the

objectives of the program or activity with respect to handicapped persons.

§§ 104.34 *Educational setting.*

(a) ***Academic setting.*** A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

Appendix A – Secretary's Section by Section Analysis of Final Regulations of the United States Department of Education for the Enforcement of Section 504, 34 C.F.R. Part 104:

6. ***General prohibitions against discrimination.*** Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as

opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 104.38 and 104.47 in connection with physical education and athletics programs.

§ 601 of the Education of the Handicapped Act, 20 U.S.C. § 1400:

(b) Findings

The Congress finds that--

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often a great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and insure the effectiveness of efforts to educate handicapped children.

§ 602 of the Education of the Handicapped Act, 20 U.S.C. § 1401(a)(19)(C):

The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and whenever appropriate, such child, which statement shall
include -- . . .

> a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs . . .

§ 612 of the Education of the Handicapped Act, 20 U.S.C. § 1412:

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met: . . . .

(5) The State has established . . . (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public and private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily . . .

§ 614 of the Education of the Handicapped Act, 20 U.S.C. § 1414(a):

A local educational agency or an intermediate educational unit which desires to receive payments under section 611(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall --

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which -- . . .

(C) establish a goal of providing full educational opportunities to all handicapped children, including . . .

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(b) of this title, the provision of special services to enable such children to participate in regular educational programs . . .

§ 615 of the Education of the Handicapped Act, 20 U.S.C. § 1415(e)(2):

Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. An any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

§ 3 of the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(f):

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Regulations of the United States Department of Education Enforcing the Education of the Handicapped Act, 34 C.F.R. Part 300 –

§ 300.1 ***Purpose.***

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist states and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

§ 300.227 ***Participation in regular education programs.***

(a) Each application shall include procedures to insure that to the maximum extent practicable, and consistent with §§ 300.550-300.553 of Subpart E, the local education agency provides special services to enable handicapped children to participate in regular education programs.

§ 300.346 ***Content of individualized education program.***

The individualized education program for each child must include: . . . .

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which

the child will be able to participate in regular education programs. . . .

§ 300.550 *General.*

(b) Each public agency shall insure: . . . .

(2) That special classes, separate schooling or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: . . . .

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home . . . .

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped . . . .

Comment. . . . The overriding rule in this section is that placement decisions must be made on an individual basis. . . .

Appendix A – Secretary's Section by Section Analysis of Final Regulations of the United States Department of Education for the Enforcement of the Education of the Handicapped Act, 34 C.F.R. Part 104:

RELATIONSHIP BETWEEN REGULATIONS UNDER [EHA] PART B AND REGULATIONS UNDER SECTION 504

The regulations under section 504 of the Rehabilitation Act [34 C.F.R. part 104] deal with nondiscrimination on the basis of handicap and basically require that recipients of Federal funds provide equal opportunities to handicapped persons (for example, that they meet the needs of handicapped persons to the same extent that the needs of nonhandicapped persons are met). Subpart D of the section 504 regulations ("Preschool, Elementary, and Secondary Education") contains requirements very similar to those in Part B of the Education of the Handicapped Act. . . .

In several instances, the section 504 regulations specifically reference where a requirement may be met by complying with a requirement under subpart B. For example, § 84.33(b)(2), dealing with appropriate education, cites implementation of an individualized education program as one means of meeting the requirement. § 84.33(d) has a September 1, 1978 outside date for providing an appropriate education to qualified handicapped persons (conforming to the timelines in Part B). Section 84.35(d) indicates that a reevaluation procedure consistent with the part B requirements is one means of meeting the reevaluation requirement under section 504. Section 84.36, dealing with due process requirements, indicates that compliance with the procedural safeguards in Part B is one means of meeting those requirements.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory

term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (i) are designed to meet individual needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . ."

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983:

Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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No. 91-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL W. BARNETT, *et al.*,
Petitioners,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Respondent.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a local school board that offers an admittedly appropriate and high-quality special education program to a small number of students in a centrally-located regular school is compelled by the Individuals with Disabilities Education Act (formerly the Education of All Handicapped Children Act, "EHA"), or by § 504 of the Rehabilitation Act of 1973 ("§ 504"), to duplicate that program for a single student at another school that is located a few miles closer to the student's home.

2. Whether a local school board that has always provided an appropriate and high-quality special education program enabling a hearing-impaired student to be completely mainstreamed at a regular high school near his home, should be liable for over $100,000 in tort damages under the EHA, § 504, or 42 U.S.C. § 1983, solely on account of that student's alleged emotional distress at not having the program duplicated for him at the school closest to his home.

3. Whether this Court's holding in *Lytle v. Household Manufacturing Co.* requires reversal of the Court of Appeals' decision, even though the material facts relating to the School Board's compliance with the EHA and § 504 were not in dispute, and neither the EHA nor § 504 provides for a trial by jury.

4. Whether the Court of Appeals correctly held that the Petitioners had the burden of proving that the School Board violated the EHA and § 504.

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No. 91-62

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OCTOBER TERM, 1991

MICHAEL W. BARNETT, *et al.*,
Petitioners,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Fairfax County School Board (the "School Board"), files this Brief in Opposition to the Petition for Writ of Certiorari to respond to the arguments raised by the Petitioners, Michael Barnett ("Michael") and his parents.

GROUNDS OF JURISDICTION

Michael graduated from high school in June, 1991. He is no longer entitled to educational services from the School Board, and, therefore, his claim for injunctive relief is moot. *Honig v. Doe*, 484 U.S. 305, 317-18 (1988).

For the reasons set forth in this Brief in Opposition, and in the opinions of the Court of Appeals and District Court below, Michael has no right to recover monetary damages for emotional distress.

STATEMENT OF THE CASE

(1) Nature of the Case

This is an appeal by a profoundly hearing-impaired young man, Michael Barnett, and his parents, from the adverse decisions of a State Administrative Hearing Officer, the District Court, and the U.S. Court of Appeals for the Fourth Circuit. The Petitioners object to the School Board's special education placement of Michael. They concede that the special education program offered by the School Board was not only appropriate but of "high quality." Nonetheless, they contend that the School Board was legally required to duplicate this program at a school slightly closer to their home. They seek more than $100,000 in "emotional distress" damages because the School Board did not agree to do so.[1] They assert purely statutory claims based on the Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act), 20 U.S.C. §§ 1400-1485 (1988) (the "EHA"); § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) ("§ 504"); and Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988) ("§ 1983").

(2) Course of Proceedings

Petitioners instituted an administrative hearing in 1988 to challenge the School Board's refusal to duplicate its Cued Speech program at Michael's base school. Although a local hearing officer ruled in their favor, the State Administrative Hearing Officer reversed. Petitioners then filed their Complaint in federal district court in April, 1989, appealing the decision of the State Administrative Hearing Officer.

---

[1] Petitioners now try to couch this case as a demand for interpreter service only, but that was not the basis upon which it was litigated. From their initial request to the school system, throughout the administrative hearing, and in their Complaint, Petitioners sought to compel the School Board to duplicate the ***entire*** program, including interpreter service, resource assistance, and speech therapy. Petitioners did not seek reimbursement for any private interpreter services.

Petitioners sought mandatory injunctive relief to compel the School Board to provide Michael at his base school all the services that he had been receiving at the mainstreamed but centralized program. Petitioners also sought monetary damages for emotional distress in excess of $100,000.00.

On August 25, 1989, the District Court struck Petitioners' damages claims and demand for a jury trial, allowing the claims for equitable relief to go forward for a bench trial. The case was tried on August 30, 1989. On September 7, 1989, the court issued Findings of Fact and Conclusions of Law. It held that the School Board had offered Michael an appropriate education in the least restrictive environment.

In a per curiam opinion, the Court of Appeals for the Fourth Circuit affirmed the District Court's ruling that the School Board was not required to duplicate the Cued Speech program at Michael's base school under either the EHA or § 504.

Following the adverse judgment of the District Court, Petitioners voluntarily withdrew Michael from the Cued Speech program. In June, 1991, Michael graduated from high school and received a regular high school diploma.

(3) Statement of Facts

Michael is an eighteen-year-old young man who suffers from profound hearing loss. While in elementary and secondary school, he was eligible for special education as a "hearing-impaired" student.

At the time Michael began first grade, the Fairfax County School Board offered a choice of two methodologies to hearing-impaired students: the traditional "Total Communication" approach (in which communication takes place in signed English), and the "Auditory/Oral" approach (in which communication takes place strictly by the use of lip-reading and residual hearing). Several parents, including Michael's, requested that the School Board develop a third program utilizing the relatively new and not widely employed "cued speech" methodology. This method uses an interpreter to repeat the words spoken by the classroom teacher and to provide manual cues to assist the hearing-impaired student to read the interpreter's lips.

The School Board responded by creating its Cued Speech program at a network of centrally-located regular schools at the elementary, intermediate (seventh and eighth grades) and high-school levels. The schools are situated close to one another and to major transportation arteries. They make up a natural feeder network so that students may advance through the grades together with their non-handicapped classmates.

Michael thrived in the Cued Speech program, earning high grades and making friends. With the assistance of Cued Speech interpreters, resource teachers and speech and language therapy, Michael gradually spent more and more time in regular, "mainstream" classes. By eighth grade, Michael was main-streamed for all of his academic classes, and he generally received grades of "A" or "B" in all subjects.

Michael remained in the Cued Speech program when he entered high school. The Cued Speech program at the high school level was located at Annandale High School ("Annandale"), one of Fairfax County's 24 regular high schools. During his ninth and tenth grade years at Annandale, Michael took a rigorous academic program entirely in regular classes with non-handicapped students. Michael excelled at Annandale. He continued to do well in his classes, and he participated in demanding extracurricular activities as a member of the baseball and basketball teams. Michael testified that he got along well with his classmates and teammates, and continued to be motivated in sports and in school.

Nonetheless, Michael and his parents preferred that he attend West Springfield High School ("West Springfield"), which was located five miles closer to Michael's home than Annandale. Michael's parents demanded that the School Board duplicate the Cued Speech program at West Springfield (including the interpreter services, resource teachers, and speech and language therapy). The School Board could not comply with this demand. Its decision to centralize some of its programming to serve the needs of some special education students was compelled by several educational and practical factors.

First, centralizing the specialized personnel and resources enabled the School Board to offer a selection of programs and services it could never otherwise provide. Fairfax County is one of only five school districts out of 14,000 nationwide that offers a

choice of three different methodologies for teaching hearing-impaired students.

Second, the School Board's Cued Speech program is a comprehensive, integrated program that involves much more than interpreter services. Students receive speech and language therapy from a certified clinician, and resource assistance from specially trained teachers of the hearing-impaired. The program is overseen by a single administrative staff that hires, trains and schedules interpreters. The staff also monitors and supervises all the resource teachers, therapists, audiologists, and other personnel. This supervision ensures the continued high quality of the program and could not be maintained if the services were spread out among the many individual schools around the county.

Third, centralization permits the limited number of qualified interpreters to be shared. In the Cued Speech program, for example, there are only three full-time interpreters, five part-time interpreters and one substitute to serve the 22 cued speech students at the preschool, elementary, intermediate, and high school levels. Similarly, only 12 sign-language interpreters are available to serve the 56 hearing-impaired students in the Total Communications program.[2] Centralizing these programs allows the limited number of available interpreters to serve all of the students who need them.[3] This is critical, since students in the Cued Speech and Total Communication programs come from base schools not only from across Fairfax County but from other jurisdictions as well. In addition, the central location permits interpreters to substitute for one another in the event of absences, or to substitute at the other schools where Cued Speech programs are located.

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[2] These constraints are not unique. The School Board knows of no school system in the country that provides full-time cued speech interpreter service to students in their base schools. The testimony of Elizabeth Fleetwood, upon which Petitioners' rely for the notion that the school system in Montgomery County, Maryland, provides interpreters for students in their base schools, in fact supports the opposite conclusion. Ms. Fleetwood testified that Montgomery County has a center-based Cued Speech program. Her daughter received interpreter service there only part-time, not full time as Michael did. Ms. Fleetwood knew of no student who received full-time interpreter service in his base school.

[3] Because there are more cued speech students than interpreters, students in the program do not have one "dedicated interpreter" who could just as easily be

The Petitioners do not dispute that qualified interpreters are in short supply. Witnesses for both Michael and the School Board described the many ways in which the School Board has tried unsuccessfully to find more. In spite of these efforts, the School Board was unable to cover several of Michael's classes when interpreters were absent. If Michael and the other students who needed interpreters were required to be educated at their base schools, it would be impossible for the School Board to supply them with interpreter services.[4]

Finally, centralization provides many important educational advantages and benefits. It allows the resource teachers, speech and language therapists, and other special education staff to share information and to interact with and support one another on a regular basis. It also allows the regular teaching staff to build more experience serving hearing-impaired students. These advantages cannot be duplicated by providing a student with periodic assistance of itinerant resource teachers or therapists.

Because Annandale is about 5 miles farther away from Michael's home than is West Springfield, Michael's placement entailed some additional travel time. According to Michael and his mother, that additional time averaged about 21 minutes each way per day, or about 3 ½ hours per week. Still, this trip took less time than Michael's commute to elementary or intermediate school. Indeed, many students in Fairfax County travel much farther distances to attend their base schools. Many others, for a variety of reasons, do not attend the school geographically closest to their home.

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assigned to a base school. In 9th and 10th grade, for example, Michael was served by three different interpreters every day. These interpreters were available only part-time, or spent other parts of their days with other students at Annandale, or at other schools. Similarly, a centrally-based resource teacher of the hearing-impaired, such as those at Annandale, can serve as many as 24 students. A resource teacher who services more than one school can attend to only 7 or 8 students.

[4] While, the precise number of additional students interested in interpreter service at their base school could not be determined, a conservative estimate was that the demand would require tripling the number of interpreters currently employed.

Petitioners have always been totally satisfied with the substance of the individualized education program (IEP) that was developed for Michael. They concede that the Annandale Cued Speech program is "appropriate" and of "high quality." Their sole complaint is with the location of the services.

SUMMARY OF ARGUMENT

The School Board complied with the educational placement requirements imposed by the EHA. The Petitioners concede that the Cued Speech program at Annandale was appropriate and of high-quality. They contend only that the School Board was required to reproduce this program at Michael's base school, which was located five miles closer to his home. Centralizing the cued speech program at a regular high school did not violate the EHA. The EHA expresses a preference for "mainstreaming," and Michael was fully mainstreamed. Moreover, while the EHA regulations require that geographical proximity be taken into account when making special education placement decisions, they do not compel a school system to reproduce a small, resource intensive centralized program at the public school closest to the child's home. Centralization provides educational benefits that could not otherwise be obtained. More importantly, the school system could not possibly provide interpreter services to each hearing-impaired student who demanded to attend his base school.

The School Board also complied with § 504. It did not segregate Michael from non-handicapped students, but successfully integrated him while simultaneously meeting his special education needs. Moreover, the School Board's compliance with the more demanding requirements of the EHA conclusively established its compliance with the less demanding standards of § 504.

The $100,000 in emotional distress damages sought by the Petitioners under the EHA and § 504 are not available as a matter of law. While the EHA permits a court to exercise its equitable powers to award reimbursement type relief, tort damages are simply not available. Tort damages are also unavailable under § 504, particularly where, as here, there is no evidence of intentional discrimination. The Petitioners cannot circumvent these damages limitations by the convenience of pleading their

statutory claims through the "and laws" provision of § 1983.

Since the Petitioners failed to establish any statutory violation, the Court of Appeals did not need to address their damages claim or demand for a jury trial. In any event, the material facts were not in dispute and did not require a jury to resolve. Neither the EHA nor § 504 provide for a jury trial, and the administrative structure of the EHA is inconsistent with the use of a jury.

Finally, the Petitioners properly bore the burden of proving that the School Board violated the EHA and § 504. As a practical matter, however, the allocation of the burden of proof did not affect the outcome below.

The Court of Appeals' decision did not create any split in the Circuits, and review by this Court is not warranted.

ARGUMENT

I. The School Board Complied with the EHA by Offering Michael Cued Speech Services at Annandale.

Petitioners argue that the School Board violated Michael's rights under the EHA by offering him Cued Speech interpreters, resource teachers, and speech and language therapy at Annandale, but not at West Springfield, as he would have preferred. The pertinent statutory provisions and authorities demonstrate that the School Board offered Michael an educational program that not only complied with but surpassed its responsibilities under the EHA.

A. The School Board's Program at Annandale Enabled Michael to be Fully Mainstreamed in a Regular School.

No authority supports the Petitioners' contention that the EHA required the School Board to duplicate its Cued Speech program for Michael alone at West Springfield. The EHA provision they rely upon provides that states must establish:

> (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other

> care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .

20 U.S.C. § 1412(5)(B) (1988). This provision articulates a preference for "mainstreaming" handicapped children with regular education students. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 & n.4 (1982); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983); *DeVries v. Fairfax County School Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 294 (7th Cir.) (involving a request for cued speech services), *cert. denied*, 488 U.S. 925 (1988).

It is undisputed, however, that Michael was completely and successfully mainstreamed at Annandale. Annandale was not a "center" attended only by hearing-impaired or other handicapped students; it was a regular public high school. The Cued Speech program enabled Michael to be totally integrated with non-handicapped students for his academic classes as well as for his nonacademic activities. Michael could not have been any more mainstreamed at West Springfield than he was at Annandale. Accordingly, the requirements of this statute were met.

The Petitioners also rely on an administrative regulation interpreting the EHA that provides, in relevant part:

> Each public agency shall ensure that:
>
> (a) Each handicapped child's placement:
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> * * *
>
> (3) is as close as possible to the child's home;
>
> * * *
>
> (c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped;

34 C.F.R. § 300.552 (1990). The official comment to this regulation makes clear that this provision requires only that a school board take geographical proximity into account when it makes placement decisions, and that, where more than one appropriate program exists, the school board provide the one closest to the child's home. *Id.* In this case, Michael's IEP required the Cued Speech program. That program is available at Annandale, and there is no school nearer than Annandale that has Cued Speech services. Accordingly, the School Board's placement complied with this regulation as a matter of law. *See Pinkerton v. Moye*, 509 F. Supp. 107, 112 (W.D. Va. 1981) (observing that the regulation only requires that geographical proximity be one factor taken into account). The court in *Pinkerton* held that, in view of the finite resources available for the education of handicapped children, a school system need not duplicate a small, resource-intensive centralized program at a child's base school. *Id.* at 113-14. This reasoning is directly applicable here.

In Fairfax County, there are at least 78 other hearing-impaired students who use or will use interpreter services. If an exception were made for Michael, these other students would rightfully expect to be provided with their own individual interpreter and support services at their base schools. The Petitioners do not dispute that the School Board would be unable to provide such services. Instead, they argue that the Court should consider only the additional burden of providing such services to Michael at his base school, without considering the impact that this decision would have on the rights of the other students. The lower courts have rejected precisely this limited and unrealistic perspective,[5] and this Court should as well.[6]

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[5] *Troutman v. School Dist. of Greenville County*, EHLR Dec. 554:487, 490 (D.S.C. 1983); *Pinkerton*, 509 F. Supp. at 112-13.

[6] The cases cited by the Petitioners are totally inapposite. These cases involved claims by parents that their child should be mainstreamed in a regular classroom. *See, e.g., Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989) (mentally retarded child placed exclusively with other handicapped children); *Department of Educ. v. Katherine D.*, 727 F.2d 809, 812 (9th Cir. 1983) (child with cystic fibrosis provided only homebound program),

B. The School Board Fully Met Its Obligation to Offer a Placement Based Upon Michael's Individual Needs.

Although the Petitioners endorsed the substance of Michael's IEP, they contend that only the individuals on the IEP team could decide where to locate the special education program. They argue that the School Board failed to respect their desire to establish the Cued Speech program at West Springfield. This argument is without support. Educational placement under the EHA is the responsibility of the "public agency" (i.e., the school board). *See* 34 C.F.R. § 300.552. This Court has admonished that, in policing the requirements of the EHA, courts must be careful to avoid imposing their views of preferable educational methods upon the states. *Rowley*, 458 U.S. at 207. This stands to reason, since it is the school system that must allocate its scarce resources among numerous handicapped students, and that is responsible for structuring and administering its special education services in a coherent and educationally beneficial fashion. A school board can and must consider the effect of providing the requested services upon the resources available to other handicapped students. *See, e.g., Roncker*, 700 F.2d at 1063; *Katherine D.*, 727 F.2d at 813.

Petitioners attempt to argue that the School Board has engaged in illicit "categorical placement" by providing Cued Speech services at certain mainstreamed but centrally-located schools. "Categorical placement" refers to situations where only a single placement option exists for an entire category or categories of handicapped students. *Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia*, II B. 1 c) 1), at 29. Far from offering only one placement alternative for hearing-impaired students, the School Board has offered an entire spectrum, including residential schools, self-contained classes, and classes in regular schools. These alternatives include programs that utilize interpreters, and programs that do not. The School Board has offered students (including Michael) a choice of not one, but ***three*** different

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cert. denied, 471 U.S. 1117 (1985). In none of these cases did the parents seek to have the school system move an already-mainstreamed program to accommodate the child's desire to attend a particular school.

communication methodologies to enable them to take advantage of the school system's regular education opportunities. Indeed, this array of choices far surpasses what is required under the EHA. *See Lachman*, 852 F.2d at 297 (local school board that offered hearing-impaired student educational program employing "Total Communication" did not need to offer Cued Speech at all). Michael's placement at Annandale was not a "categorical placement" in the slightest.[7]

II. The School Board Complied with § 504.

The Petitioners also contend that the School Board violated § 504 of the Rehabilitation Act of 1973 because Michael was "excluded" from his base school. Section 504 prevents recipients of federal financial assistance from unlawfully discriminating against otherwise qualified handicapped persons under any of their programs. 29 U.S.C. § 794. The School Board complied with § 504 in this case because it provided Michael with all the benefits of its educational program, and it satisfied the more demanding requirements of the EHA.

A. Michael Was Not Excluded from Any Program.

The School Board fully and completely assimilated Michael into the regular classroom environment, while simultaneously accommodating his need for special interpreter services. Far from being "discriminatory," the School Board's program is a model of what a thoughtful and creative school system can accomplish.

Both the District Court and the Court of Appeals recognized that Petitioners' § 504 claim is foreclosed by this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In *Davis*, the Court held that a nursing college did not discriminate against a hearing-impaired student by refusing to provide her with a nursing instructor and by excusing her from courses made difficult because of her hearing impairment. This

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[7] Michael's IEP addressed in detail all areas of Michael's educational needs, including vocabulary, reading comprehension, written language, and many areas of speech. His IEP provided for extensive mainstreaming, based upon his success in regular classes. This program fully considered his individual needs.

Court unanimously rejected the student's argument that these extra efforts were mandated by § 504. Without delving into the cost that would be imposed on the college to provide such services, the Court simply held that such "affirmative action" was not required by the "language, purpose, [or] history of § 504. . . ." *Id.* at 411. The same conclusion is required here.

Unlike the nursing student in *Davis*, Michael was provided with his choice of learning methodologies available to hearing-impaired students. Only four other school districts in the United States can offer as wide a selection. Moreover, Michael has participated fully and completely in the educational program offered by the School Board, and he has been completely mainstreamed with non-handicapped students.

If the college's failure to provide a nursing instructor to the hearing-impaired student in *Davis* did not violate § 504, it is difficult to conceive how the School Board's plenary efforts to accommodate Michael could possibly violate the statute. The School Board has gone well beyond the minimum "evenhanded treatment" that was the aspiration of § 504's drafters. *Id.* at 410; *Alexander v. Choate*, 469 U.S. 287, 304 (1985).

The Petitioners assert that this Court's decisions in *Choate* and in *School Bd. of Nassau Co. v. Arline*, 480 U.S. 273 (1987), have altered the proper analysis under § 504. At one point, Petitioners cite *Choate* for the remarkable proposition that the only program modifications ***not*** required by § 504 are those that would "jeopardize" the very integrity of those programs.[8] This is not the law.[9] This Court has never required a recipient under § 504 to demonstrate that its entire program would be "jeopardized" in order to avoid liability under this Spending Clause statute.

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[8] Petition for Certiorari at 26.

[9] *See Choate*, 480 U.S. at 300 (only "reasonable modifications" are required by the statute and regulations); *id.* at 300 n.20 ("Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term 'affirmative action' referred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial,' or that would constitute 'fundamental alteration[s] in the nature of a program'") (citations omitted); *Smith v. Robinson*, 468 U.S. 992, 1018 (1984) (*Davis* "emphasized that § 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons.").

The Petitioners also claim that *Davis* was "apparently overruled" by *Arline*, 480 U.S. 273, 289 n.19 (1987). Far from "overruling" *Davis*, however, the Court in *Arline* cited from it at length, explaining that "[a]ccommodation is ***not reasonable*** if it either imposes 'undue financial and administrative burdens' on a grantee,' or requires 'a fundamental alteration in the nature of [the] program." *Id.* at 287 n.17 (*citing Davis*, 442 U.S. at 410, 412) (emphasis added). These tests were amply satisfied in this case.

Requiring the School Board to provide every hearing-impaired student like Michael with his interpreter of choice at his base school, instead of at mainstreamed but centralized locations, would constitute a substantial and fundamental modification of the School Board's educational program. *Davis*, 442 U.S. at 410; *Choate*, 469 U.S. at 300 n.20; *Arline*, 480 U.S. at 287 n.17; *accord* 34 C.F.R. §§ 104.33(d), 104.34(a), (b) (1990).[10] Both the District Court and the Court of Appeals found, as a matter of law, that § 504 does not require such radical alterations.

B. Compliance with the EHA's Educational Placement Requirements Conclusively Establishes Compliance with § 504.

The District Court was also correct in holding that the School Board's compliance with the EHA's educational placement requirements conclusively established its compliance with § 504. The EHA imposes specific, affirmative burdens on school boards to provide handicapped children with an appropriate educational placement. Both this Court[11] and the lower courts[12] have held that the more general provisions of § 504 add nothing to the specific obligations created under the EHA.

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[10] *See also Wimberly v. Labor & Indus. Relations Comm'r of Missouri.*, 479 U.S. 511, 517 (1987) (§ 504 generally does not mandate affirmative efforts to overcome the disabilities caused by handicaps); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 640 & n.27 (1986) (same).

[11] *Smith*, 468 U.S. at 1018-19.

[12] *See, e.g., DeVries*, 882 F.2d at 880 (compliance with EHA demonstrated compliance with § 504 under facts of case); *St. Louis Developmental Disabilities Treatment Center Parents Ass'n v. Mallory*, 591 F. Supp. 1416, 1471

Moreover, the administrative regulations promulgated under § 504 confirm that one method of complying with § 504's educational placement requirements is by complying with the EHA. 34 C.F.R. §§ 104.33(b)(2), 104.35(d), 104.36 (1988). Indeed, the § 504 regulations pertaining to "Educational Setting" mirror the EHA regulations. *Compare* 34 C.F.R. § 104.34(a), *with* 34 C.F.R. §§ 300.550, 552 (1990).

Because the School Board's placement of Michael in the mainstreamed program at Annandale was proper and non-discriminatory under the EHA, the Petitioners are foreclosed from attacking this conclusion by invoking the less rigorous standards of § 504.

III. Monetary Damages for Alleged Emotional Distress Cannot be Awarded in This Case.

Because the Court of Appeals concluded that the Petitioners failed to establish a violation of Michael's statutory rights, it did not need to reach the question of whether the emotional distress damages sought by the Petitioners are available under the EHA or § 504. Nonetheless, such damages are unavailable under either statute as a matter of law.

A. The EHA Precludes Recovery of Tort Damages.

It is well-settled that the EHA does not permit recovery of tort-type compensatory damages for emotional distress, and Petitioners cite no case to the contrary. Petitioners' argument that such damages should now be recoverable ignores this Court's decision in *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985), and the cases that have followed it, including

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(W.D. Mo. 1984) ("compliance with Section 504 is less demanding than is compliance with the Education Act. That being the case . . . when the Section 504 claim concerns a facet of the education of handicapped children covered by the Education Act, such as the educational program or placement, a showing of compliance with the latter satisfies the former."), *aff'd*, 767 F.2d 518 (8th Cir. 1985); *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340, 1346-47 (N.D. Ill. 1983) ("§ 504 certainly cannot impose any greater educational requirements on the states than does the EHA").

Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

The EHA's remedies are equitable in nature. Where a school board has failed to provide an appropriate educational program, the court may invoke its "equitable" powers to order a school district to reimburse parents for their private tuition expenses. *Burlington*, 471 U.S. at 374. However, such equitable remedies are fundamentally distinct from monetary awards for tort damages. In fact, the Court in *Burlington* expressly distinguished between the two kinds of relief. 471 U.S. at 370 ("the Town repeatedly characterizes reimbursement as 'damages,' but that simply is not the case."); *see also Hall*, 774 F.2d at 633 n.3 (drawing same distinction).

The Petitioners' reliance on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and on *Davis v. Passman*, 442 U.S. 228 (1979), is misplaced. Both of these cases involved the question of whether a common law action for money damages could be brought in federal court for violations of the federal Constitution.[13] The Court in *Passman* held that the *Bivens* line of cases was ***inapplicable*** to determining what relief is available for the enforcement of federal ***statutes***.[14]

The first and still most comprehensive analysis of the availability of monetary damages under the EHA was performed by the Seventh Circuit in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981). In *Anderson*, parents sued for monetary damages under the EHA, claiming that the school board had not provided their daughter with an appropriate education. The Seventh Circuit exhaustively examined the EHA's legislative history, as well as the applicable policy considerations. The Court first observed that to allow recovery of damages in special education cases would

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[13] *Bivens*, 403 U.S. at 397 (recognizing damages remedy for violation of Fourth Amendment); *Passman*, 442 U.S. at 248-49 (recognizing damages remedy for violation of Due Process Clause of Fifth Amendment); *but see Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

[14] *Passman*, 442 U.S. at 241. The proper analysis for determining the scope of federal statutory remedies is contained in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-24 (1979).

create a cause of action for "educational malpractice" that Congress plainly did not intend. 658 F.2d at 1211. The EHA's sponsors recognized the inherent difficulty and uncertainty of providing special education programming to meet the complex needs of handicapped students. *Id.* at 1212. The court noted that "it would be incongruous for Congress to subject school systems to liability for damages each time a court disagreed with the school district's program while at the same time admitting the uncertainty of diagnosis in the field." *Id.*

Second, the *Anderson* court noted that Congress was concerned about the lack of available funds for education. Mindful of the limits on educational resources, the court concluded that the EHA's drafters did not wish to overtax the limited budgets of school systems by allowing large, retrospective damage awards. *Id.* at 1212-13.

Finally, the court observed that public policy militated against allowing recovery of compensatory damages against school boards acting in good faith, even where it later turned out that the school district should have offered a different educational placement. To allow damages in such cases would chill the flexibility and experimentation necessary in the special education field, ultimately to the detriment of handicapped students. The court concluded that compensatory damages were not recoverable. *Id.* at 1213.

The persuasive analysis of *Anderson* has been followed in many subsequent cases.[15] By contrast, the Petitioners have cited no case in which a court has awarded emotional distress damages under the authority of the EHA.

B. Damages for Emotional Distress are Not Available Under § 504.

In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984), this Court held that "§ 504 authorizes a plaintiff who alleges ***intentional discrimination*** to bring an ***equitable*** action for ***backpay***." (Emphasis added). The Petitioners are asking this

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[15] *See, e.g., Hall*, 774 F.2d at 633 n.3 (EHA permits reimbursement remedy, but "does not create cause of action for educational malpractice").

Court to enlarge dramatically the narrow holding of *Darrone*, in order to allow the recovery of emotional distress damages resulting from ***un***intentional acts that have a purportedly disparate impact on handicapped persons. This position is at odds with this Court's prior holding in *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983), and contrary to the Title VI remedies that Congress explicitly directed be used under § 504.[16]

Although there was no single majority opinion in *Guardians*, five justices agreed that equitable relief in the form of backpay, if available at all under Title VI, could be recovered ***only*** upon a showing of intentional discrimination.[17] By contrast, the Petitioners are seeking tort damages, not equitable relief. Moreover, they have not produced any evidence of intentional discrimination against Michael. Accordingly, the Petitioners have no right to recover emotional distress damages under § 504. This Court need not reach the other damages questions left open in *Guardians*.

C. The HCPA Does Not Make Tort Damages Available Under § 1983 for Violations of the EHA or § 504.

Although damages for emotional distress are unavailable under the EHA and § 504, the Petitioners contend that they can recover such damages by asserting these statutory claims separately through § 1983. Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. As a matter of law, however, tort damages are unavailable in this case because (1) the remedial schemes created under the EHA and § 504 are sufficiently comprehensive to dem-

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[16] 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Acts of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under § 504 of this title."); *Darrone*, 465 U.S. at 626.

[17] *Guardians*, 463 U.S. at 602-03 (White, J., joined by Rehnquist, J.) (injunctive and declaratory relief only available remedies for disparate impact discrimination; backpay available, if at all, only upon showing of discriminatory animus); *id.* at 610-11 (Powell, J, joined by Burger, C.J., Rehnquist, J., concurring) (no violation of statute absent proof of discriminatory intent); *id.* at 612 (O'Connor, J., concurring) (same).

onstrate Congress' intent to preclude the remedy of parallel suits under § 1983, and (2) even if a cause of action were available under § 1983, a tort-damage remedy is inappropriate to protect the rights created by the EHA and § 504.

1. Section 1983 Does Not Allow This Solely Derivative Claim:

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that § 1983 provided a cause of action for the deprivation of federal statutory rights. The Court's decisions since *Maine* have recognized an exception to this general principle where the underlying statute provides a remedial scheme that is sufficiently comprehensive to demonstrate Congress' intent to preclude the remedy of suits under § 1983.[18] This exception applies here. This Court has repeatedly held that the EHA and § 504 provide such comprehensive schemes.[19] Moreover, as explained above, a damages remedy would be fundamentally inconsistent with the remedial purposes of these statutes.

The Petitioners contend that Congress intended tort damages to be recoverable when it passed the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (the "HCPA"). Nothing in the text or legislative history of the HCPA supports this position.[20]

Congress enacted the HCPA to overturn certain aspects of this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). The

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[18] *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1, 19-20 (1981); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448-49 (1989); *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2516-17 (1990).

[19] *Dellmuth v. Muth*, 491 U.S. 223, 225 (1989) ("The [EHA] enacts a comprehensive scheme to assure that handicapped children may receive a free public education appropriate to their needs."); *Smith v. Robinson*, 468 U.S. 992, 1016 (1984) ("The EHA is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education."); *Darrone*, 465 U.S. at 626 ("The Rehabilitation Act of 1973 establishes a comprehensive federal program aimed at improving the lot of the handicapped.").

Court in *Smith* held that attorney's fees were unavailable under the EHA. The Court reasoned that, while attorney's fees were available in an action brought either under § 504,[21] or under § 1983 based on a violation of the Equal Protection Clause,[22] the EHA provided the far more comprehensive remedial scheme with respect to educational placement decisions. Accordingly, the Court held that the EHA provided the ***exclusive*** vehicle for asserting rights that are protected by the EHA. *Id.* at 1013.

Justice Brennan dissented. He urged that the EHA be reconciled with § 504 and § 1983. The dissent interpreted the EHA only to require exhaustion of administrative remedies ***before*** a plaintiff could file a § 504 or § 1983 action, under which attorney's fees could then be recovered. *Id.* at 1024 (Brennan, J., dissenting).

In enacting the HCPA, Congress adopted Justice Brennan's position.[23] Section 2 of the HCPA provided that prevailing EHA plaintiffs could recover attorney's fees, although the allowable fees are subject to extensive restrictions not applicable to cases brought under § 1983. *See* 20 U.S.C. § 1415(e)(4)(B)-(G) (1988). Section 3 of the HCPA added a "savings clause" to the EHA. 20 U.S.C. § 1415(f) (1988). This "savings clause" provided that nothing in the EHA should be construed to limit "the rights, procedures and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children. . . ." *Id.* It also required exhaustion of the procedural requirements under the EHA before any other claim could be brought seeking relief that was also available under the EHA. *Id.* This section thus overruled *Smith*'s holding that the EHA foreclosed resort to § 504 claims, or to § 1983 claims based upon the Constitution.

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[20] *See* Sido & King, *Monetary Remedies Under the Education of All Handicapped Children Act: Toward a New Civil Rights Act*, 23 Tort Ins. L. J. 711, 729-33 (1988) (concluding that Congress did not intend the HCPA to provide damages remedies for EHA violations).

[21] *See* 29 U.S.C. § 794a(b) (1988).

[22] *See* 42 U.S.C. § 1988 (1988).

[23] *See* S. Rep. No. 112, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1799.

Although the HCPA allowed EHA plaintiffs to bring § 1983 actions based upon the *Constitution*, nothing in the legislative history supports the notion that EHA claims can now be asserted redundantly through the "and laws" provision of § 1983.[24] The Court of Appeals did not need to reach this issue. Other federal courts have had little occasion to address the scope of the HCPA.[25] Nevertheless, several factors compel the conclusion that Congress did not intend for the HCPA to permit the recovery of large, tort-like damage awards for violations of the EHA or § 504.

First, *Smith* was not an "and laws" case,[26] and the dissent in *Smith* never contended that the EHA could or should be enforceable through § 1983. Justice Brennan focused on the majority's decision to foreclose the recovery of attorney's fees under the EHA, and to preclude EHA plaintiffs from bringing § 504 or ***constitutional*** claims. In fact, the dissent apparently assumed that the EHA and § 504 were comprehensive remedial schemes that

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[24] There was no discussion of the "and laws" issue in the floor debates, which focused principally on the attorney's fees amendment. *See, e.g.*, 132 Cong. Rec. S9,277 (daily ed. July 17, 1986) (statement of Sen. Weicker) ("What we do here today is to make the Education of the Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of attorneys' fees to parties who prevail in court to obtain what is guaranteed to them by law.").

[25] Two courts have interpreted the HCPA to allow EHA claims to be asserted through § 1983, but both cases involved requests only for injunctive or declaratory relief. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 775 (2d Cir. 1987); *Digre v. Roseville Schools Indep. School Dist.*, 841 F.2d 245, 249-50 (8th Cir. 1988). Other courts have found that the EHA remains a comprehensive remedial scheme, completely foreclosing parallel § 1983 claims, *Lawson v. Edwardsburg Pub. School*, 751 F. Supp. 1257, 1261 (W.D. Mich. 1990); or that compensatory damages may be recovered only if the plaintiff brings a constitutional claim in addition to his EHA claim, *Begay v. Hodel*, 730 F. Supp. 1001, 1010 (D. Ariz. 1990) (*Bivens* damages allowed for constitutional violations, but not if there is only an EHA violation). In the case relied on by the plaintiffs, *Board of Educ. v. Diamond*, 808 F.2d 987, 996 (3d Cir. 1986), the court did not specify what kind of damages were involved, nor did it distinguish between damages based on constitutional violations from those predicated solely on the EHA.

[26] *Smith*, 468 U.S. at 1004-05 ("In this case, petitioners made no effort to enlarge the remedies available under the EHA by asserting their claim through the "and laws" provision of § 1983.").

would ***not*** serve as independent predicates for § 1983 actions.[27] Congress did not adopt a contrary position.

Second, when Congress enacted the HCPA in 1986, the "overwhelming majority of cases" had precluded the recovery of compensatory damages under the EHA.[28] Congress said nothing about overruling those cases. If it had intended to, Congress could have easily amended the EHA to provide for tort damages, just as it amended the EHA to allow for the recovery of attorney's fees.[29]

Third, allowing EHA plaintiffs to assert identical EHA claims through § 1983, and, consequently, to recover attorney's fees under 42 U.S.C. § 1988 (1988), would totally circumvent the specific limitations that Congress imposed on the recovery of fees in EHA cases. *See, e.g.*, 20 U.S.C. §§ 1415(e)(4)(C) (1988) (providing that no bonus or multiplier may be used for fees recovered under EHA); 1415(e)(4)(D) (1988) (relating to parents who reject settlement offers).

Fourth, Congress would have been aware in 1986 that the "savings clause" enacted in § 3 of the HCPA would not suffice to create § 1983 actions based solely on duplicative EHA claims. *See Middlesex County Sewage Auth. v. National Sea Clammers*, 453 U.S. 1, 20 n.31 (1981) (rejecting identical argument that "savings" clauses were intended to refer to redundant § 1983 claims based upon the same statutory claim). Had Congress intended a contrary result, or if it had intended for EHA plaintiffs to recover tort damages, "we would expect to find some evidence of that intent in the statute or its legislative history. We find none."[30] Indeed, the 101st and 102d Congress hotly debated

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[27] *See Smith*, 468 U.S. at 1023 n.2 (Brennan, J., dissenting).

[28] Sido & King, *supra* note 20, at 730.

[29] Notably, both the House and the Senate Reports remarked that the HCPA would have some effect on the budgets of state and local governments because it would force them to pay attorney's fees to successful EHA litigants. S. Rep. No. 112, 99th Cong., 2d Sess. 3-4, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1800-01; H.R. Rep. No. 296, 99th Cong., 1st Sess. 10-11 (1985). The Committee Reports said nothing about the impact of compensatory damage awards, although some congressmen did question whether allowing the recovery of attorney's fees for EHA administrative proceedings would impose undue costs on school systems. *See* H.R. Rep. No. 296, *supra* at 16-17.

whether to amend the Civil Rights Act of 1964 to provide for compensatory damage awards and jury trials. These debates make clear that Congress does not believe that § 504 currently provides these remedies.[31]

2. Petitioners Cannot Utilize § 1983 to Obtain Remedies Inconsistent with the EHA and § 504.

Even assuming *arguendo* that Petitioners could bring a § 1983 claim based entirely upon a violation of the EHA or § 504, a compensatory damages remedy would still be unavailable. This Court has emphasized that the kind of damages available for violations of § 1983 varies according to the particular substantive right involved. *Carey v. Piphus*, 435 U.S. 247, 258-59 (1978). The remedies available for the violation of one right secured by § 1983 "are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 265.[32] Since Petitioners' § 1983 claim is identical to their EHA and § 504 claims,

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[30] *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989). The Petitioners' quotation from the House Conference Report is somewhat misleading. H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 7, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1809 ("It is the conferee's intent that actions brought under § 1983 are governed by this provision."). This passage refers to the decision of the House to recede to the Senate's version of the EHA exhaustion requirement. The quotation cannot be taken to mean anything more than that Congress intended an exception to the general rule in § 1983 cases that exhaustion is not required before instituting suit.

[31] *See e.g.*, H.R. Rep. No. 40, 102d Cong., pt. 1, at 146 & n.17 (1991) (listing § 504 as one of the many existing statutes that does not provide for punitive and compensatory damages); H.R. Rep. No. 40, 102d Cong., pt. 2, at 68 (1991) ("Under present law, title VII damages are limited to back pay, reinstatement and other injunctive relief. Jury trials are not available for violations of title VII.").

[32] *See also Guardians*, 463 U.S. at 602 n.23 (White, J., joined by Rehnquist, J.) ("Damages indeed are usually available in a § 1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute."); *Bivens*, 403 U.S. at 409 n.9 ("the appropriateness of money damages may well vary with the nature of the personal interest asserted.") (Harlan, J., concurring).

the restrictions on the recovery of damages inherent in those statutes would also limit the remedy, if any, available under § 1983.

IV. The Court of Appeals' Decision Comports with *Lytle v. Household Manufacturing*

Confronted with dispositive factual findings against them by the District Court below, the Petitioners now attempt to escape the consequences of those findings by arguing that they should have had a jury trial.[33] The Petitioners rely on this Court's recent decision in *Lytle v. Household Mfg.*, 110 S. Ct. 1331 (1990). *Lytle* is inapposite to the facts of this case.

First, the Court of Appeals did not need to reach the jury trial issue because there were no disputed material facts that required a jury to resolve. *Cf. Lytle*, 110 S. Ct. at 1338 (evidence sufficient for a jury to find discrimination under the facts presented). The Petitioners conceded that the Cued Speech program at Annandale provided Michael with an appropriate and high-quality program. There was also no dispute that Cued Speech interpreters are extremely scarce, and that the School Board could not provide interpreters at each base school for the many students who might desire one. On the basis of these concessions, the Court of Appeals found, as a matter of law, that neither the EHA nor § 504 required the School Board to duplicate the Annandale program at West Springfield.

Second, even if Petitioners were entitled to sue for compensatory damages, the structure of the EHA's judicial review provision demonstrates that the *court*, not a jury, determines whether a school board has complied with the EHA. 20 U.S.C. § 1415(e)(2) (1988). Section 1415(e)(2) sets forth the manner in which aggrieved parties may seek judicial review of a state administrative decision:

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[33] The Petitioners took a somewhat contrary position in their brief to the Court of Appeals, arguing that they were entitled to judgment as a matter of law.

> In any action brought under this paragraph ***the court*** shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision upon a preponderance of the evidence, shall grant such relief as *the court* determines is appropriate.

20 U.S.C. § 1415(e)(2) (emphasis added). The statute entrusts to "the court" (***not*** "to the court or jury"), the responsibility of receiving and reviewing the administrative record and decision. In reviewing that decision, the district court does not conduct a *de novo* trial. Rather, it is required to give the review officer's decision "due weight." *Rowley*, 458 U.S. at 206. By contrast, nothing in § 504 or Title VI provides for a jury trial and, as noted above, compliance with the EHA establishes compliance with § 504.

The statutory structure of the EHA thus forecloses resort to a jury trial. The Seventh Amendment does not require a jury trial if, as here, it would be inconsistent with the statutory scheme. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455-56 (1977) (Congress may create new statutory obligations, and provide an administrative and judicial enforcement scheme, without the intervention of a jury at any stage); *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) ("Congress may devise novel causes of action invoking public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.").

The Court of Appeals did not need to reach the jury trial issues under *Lytle* because there were no issues of fact in this case that required a jury to resolve. Moreover, the Fourth Circuit has not departed from this Court's holding in *Lytle*. *See Keller v. Prince George's County*, 923 F.2d 30, 33 (4th Cir. 1991) (following *Lytle*). This case presents no occasion for revisiting the recent *Lytle* decision.

V. The Petitioners Properly Bore the Burden of Proof.

Among their assignments of error, the Petitioners also argue that the District Court and Court of Appeals improperly saddled them with the burden of proving that the School Board violated the EHA and § 504. Although the actual allocation of the burden of proof was immaterial in this case, the Petitioners properly bore the burden because they were the plaintiffs in the district court.

In EHA cases, the party challenging an adverse state administrative decision properly bears the burden of proof. *Spielberg v. Henrico County Pub. Schools*, 853 F.2d 256, 258 n.2 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989). This rule comports with this Court's statement in *Rowley* that state administrative decisions must be accorded "due weight." 458 U.S. at 206. The two cases relied upon by the Petitioners to demonstrate a purported split in the circuits did not even involve a student's appeal from adverse state administrative findings.[34]

The Petitioners similarly misapprehend the proper analysis under § 504. They assume that they have established a "prima facie" case of discrimination under § 504, and then jump to the conclusion that the burden of proof to show non-discrimination should have shifted to the School Board. The flaw in this claim is that, under *Davis*, no such "prima facie" case was made. Michael was not excluded from the regular educational program but was fully assimilated into it. The cases relied upon by the Petitioners are, therefore, inapposite. In each of those cases, the handicapped person was, in fact, excluded from the regular program offered by the recipient of federal financial assistance.[35]

In short, although it was not a dispositive factor in the decisions below, the "burden of proof" was properly borne by the Petitioners.

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[34] *Grymes v. Madden*, 672 F.2d 321 (3rd Cir. 1982) (school board's withdrawal of funding in violation of the EHA's "stay-put" provision); *S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir.) (standard for disciplining handicapped student), *cert. denied*, 454 U.S. 1030 (1981).

[35] *See, e.g., New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979) (exclusion of mentally retarded children with hepatitis from

CONCLUSION

The Court of Appeals' decision did not create a split in the Circuits, and review by this Court is not warranted. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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regular classroom); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977) (exclusion of one-eyed children from contact sports).